NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al., Petitioners

v.

JOSE RAMON MORALES, Respondent.

SUPPLEMENTAL APPENDIX RE PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX B

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RAMON MORALES,	)	No. Cv 91-6996-HLH(T)
	)	
Petitioner,	)	RETURN TO
	)	PETITION FOR WRIT
vs.	)	OF HABEAS CORPUS
	)	AND MEMORANDUM
DIRECTOR OF	)	OF POINTS AND
CORRECTIONS, E.R.	)	AUTHORITIES IN
MYERS, ATTORNEY	)	SUPPORT THEREOF
GENERAL AND BOARD OF	)	
PRISON TERMS,	)	
	)	
Respondents.	)	

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Respondents JAMES J. GOMEZ, the Director of the California Department of Corrections, DON HILL, Acting Warden of the California Training Facility in Soledad, California, and JOHN W. GILLIS, Chairman of the California Board of Prison Terms,[1] make this return to the order to show cause pursuant to this Court's order of December 27, 1991, and admit, deny and allege as follow:

I

Petitioner is lawfully and properly in the custody of the California Department of Corrections and is subject to the authority of the California Board of Prison Terms (Board) pursuant to a valid judgment and commitment in the Superior Court of Los Angeles County, Case number A361773. Exh. 1. Petitioner was sentenced to the term of fifteen years to life for the offense of second degree murder, a violation of California Penal Code section 187, following his plea of nolo contendere. Exhs. 1, 2.

II

Respondents admit that petitioner is currently in the custody of the California Department of Corrections at the California Training Facility in Soledad, California. Exh. 5.

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1. Petitioner named the Attorney General of the State of California as a respondent. However, since the Attorney General does not have custody of petitioner, he is not a proper respondent in this matter. Rule 2 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254 (1976).

III

Respondents admit that petitioner has exhausted his state court remedies. Exh. 3.

IV

Respondents deny that petitioner should be allowed to withdraw his plea. Respondents allege that petitioner received the benefit of his plea bargain. Respondents further allege that petitioner was sentenced to a 15 year to life term. Exhs. 1, 2, 8.

V

Respondents admit that petitioner appeared before the Board of Prison Terms for a parole suitability hearing on July 25, 1989 and was found to pose a threat to the community if released on parole. Exh. 4.

VI

Respondents deny that the Board of Prison Terms relied upon improper testimony or inappropriate criteria in their determination that petitioner was unsuitable for parole. Exh. 4.

VII

Respondents admit that petitioner was denied parole for three years. Respondents deny that the application of

Penal Code section 3041.5 operates as an ex post facto law. Respondents further deny that the Board relied on the base term matrix to determine parole suitability. Exh. 4.

VIII

Respondents admit that petitioner was sentenced to an indeterminate term of fifteen years to life under California Penal Code section 1168(b) for second degree murder. Respondents deny that petitioner's life sentence should be treated as a determinate sentence.

IX

Respondents affirmatively allege that under California Penal Code section 3040, the Board is the only agency that is statutorily authorized to allow life prisoners such as petitioner to be released on parole. Respondents further allege that life prisoners such as petitioner are entitled to a parole release date only when the Board has determined that they are suitable for release on parole as provided in California Penal Code section 3041. Respondents deny that petitioner must be paroled in ten years.

X

Except as herein expressly admitted, respondents deny each and every allegation of the petition and specifically deny that petitioner's confinement is in any way improper, that any judgment and commitment underlying petitioner's confinement is in any way improper, and that any of petitioner's rights are being violated in any way.

This return is based on the records and files in this case and the points and authorities and exhibits attached hereto and incorporated herein.

CONCLUSION

For the stated reasons, respondents respectfully request that the petition be dismissed.

DATED: February 24, 1992.

Respectfully submitted,

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PRISON TERMS,	)	
	)	
Respondents.	)	
	)	

PRELIMINARY STATEMENT

On July 2, 1982, petitioner was sentenced to state prison for a term of fifteen years to life for the offense of second degree murder following his plea of nolo contendere. Exhs. 1, 2. Petitioner had been released to parole in 1982 following his eleven year incarceration for a previous first degree murder. Exh. 6. The second degree murder, which occurred in 1980, involved the death of a 75 year old woman who had visited petitioner while he was in prison and secretly married him when he was released to a halfway house. Id. Although her body was never found, her hand was found on the Hollywood freeway. Id. At the time petitioner was sentenced to second degree murder following his nolo contendere plea, the court specifically noted "No finding having been made as to the special circumstances allegation" and no prior felonies. Exh. 1.

Petitioner's earliest minimum eligible parole date (MEPD) for the second degree murder was calculated to be August 2, 1990. Exhs. 5, 7. On July 25, 1989, the Board of Prison Terms (hereinafter the "Board") conducted petitioner's initial parole consideration hearing. Exh. 4. After consideration of all of the evidence presented, the Board found petitioner unsuitable for parole. Id.

The Board stated in its finding of unsuitability for parole that petitioner's offense was carried out in an especially heinous, atrocious, or cruel manner, and that petitioner had a record of violence and assaultive behavior with an unstable social history. Exh. 4. Psychiatric evaluations also did not support release and accordingly, the Board made a finding that

petitioner would pose a threat to public safety. Id. The Board denied parole for three years and scheduled the next parole suitability hearing for July, 1992. Id.

Petitioner filed a petition for writ of habeas corpus with the California Supreme Court on August 22, 1991. Exh. 3. The petition was denied by the California Supreme Court on October 30, 1991 citing In re Miller, 17 Cal.2d 734, 735. Id. Accordingly, petitioner appears to have exhausted his state court remedies. The instant petition was filed in this court on December 26, 1991.

PETITIONER'S CONTENTIONS

Petitioner contends that:

1. The Parole Board's use of the 1970 prior conviction in denying parole suitability is a denial of his eighth and fourteenth amendment rights. Petn., p. 6.

2. The sentencing's court failure to strike his 1970 prior conviction and it's subsequent use in a parole suitability hearing is a denial of his eighth and fourteenth amendment rights. Petn., p. 6.

3. The scheduling of a parole consideration hearing in three years by the Board is an application of an ex post facto law. Petn., p. 6

4. He did not get the benefit of his plea bargain because the trial court at the sentencing hearing failed to

advise him of the consequences of his plea. Petn., p.7.; Petn., P's & A's, p. 5.

5. Under Proposition 7, his term of imprisonment is controlled by California Penal Code sections 2930 and 2931. Petn., p. 7.

6. His plea must be withdrawn because of noncompliance with Penal Code sections 1192.5 and 1192.6. Petn., P's & A's, p. 5.

7. The Board used improper criteria and hearsay statements at his parole suitability hearing. Petn., P's & A's, p. 5.

8. The use of the parole eligibility matrix is an application of an ex post fact law. Petn., P's & A's, p. 5.

9. A fifteen years to life sentence under Proposition 7 and Penal Code section 190 was not intended under Penal Code section 1168(b) to warrant a "straight natural life" sentence. Petn., P's & A's, p. 6.

10. The Board's "sentence" of fifteen years to life in must be stricken because the judge did not say "life" at the time the sentence was imposed. Petn., P's & A's, p. 6.

11. If the court determines that petitioner was sentenced to a term of fifteen years to life, petitioner must be paroled in ten years under Penal Code section 190. Petn., P's & A's, p. 6.

SUMMARY OF RESPONDENTS' ARGUMENT

Petitioner entered an informed plea and received the benefit of his plea bargain. There was a factual basis for the plea in accordance with California Penal Code section 1192.5. Additionally, petitioner was sentenced to a 15 year to life term.

Despite the 1977 change in the California sentencing laws from indeterminate to determinate sentencing, the penalty for second degree murder remained an indeterminate term of fifteen years to life. As a result, petitioner was entitled to consideration for parole by the Board upon completion of his minimum eligible parole date, but is not entitled to either a parole date or release on parole until the Board finds him parole suitable. The Board's use of guidelines to determine petitioner's suitability for parole is proper under the California Code of Regulations. The base term matrix was not utilized by the Board. In addition, the Board's decision to schedule petitioner's next parole suitability hearing in three years in advance is not an application of ex post facto law. Finally, the Board may consider all relevant evidence in making parole decisions. The Board did not use false or inaccurate information in petitioner's case.

ARGUMENT

I

PETITIONER RECEIVED THE BENEFIT OF HIS PLEA BARGAIN

Petitioner contends that the trial court failed to strike the 1970 prior conviction and failed to advise him that the special circumstance allegation would be used as a "non-parole suitability enhancement". Petn., p. 6, 7,; Petn. P's & A's, p. 10. Petitioner also claims that the prosecutor misinformed him of his parole eligibility. Petn., P's & A's, p. 5. Petitioner maintains that his plea should therefore be withdrawn. Id. Respondents disagree and submit that petitioner received the full benefit of his plea agreement.

As a preliminary matter, issues pertaining only to state sentencing procedures are not grounds for federal relief. Strum v. California Adult Authority, 395 F.2d 446, 448. (9th Cir. 1976). Further, the burden is on petitioner to prove by a preponderance of the evidence that his plea was not made voluntarily and intelligently. Johnson v. Lumpkin, 769 F.2d 630, 633-4 (9th Cir. 1985). In a case such as this where there is a complete record of the plea proceedings which shows that petitioner was adequately advised of his rights and the consequences of his plea, petitioner can meet his burden only in the most extraordinary circumstances. Blackledge v. Allison, 431 U.S. 63, 80, 97 S.Ct. 1621, 1631, 52 L.Ed.2d 136 (1977); Boykin v. Alabama, 395 U.S. 238, 243-244, 89 S.Ct. 1709, 1712-1713, 23 L.Ed.2d 274 (1969).

Petitioner first attempts to satisfy his burden by claiming that the trial court failed to strike the special circumstance allegation.[2/] Petitioner is incorrect.

The plea was entered in the instant case on April 13, 1982. Exh. 8. At the time of the plea, petitioner was questioned as to his understanding and willingness to plead guilty. Exh. 8, R.T. 5-13. The record clearly shows that petitioner was aware that he would plead no contest to the charge of second degree murder and that the prosecution would ask the court to dismiss the allegation of special circumstances. Exh 8, R.T. 6. The record clearly shows that a plea to second degree murder was entered into by petitioner. Exh. 8, R.T. 15. The abstract clearly specifies that the court noted that no finding had been made as to the special circumstance allegation. Exh. 1. There is no evidence in the record that shows that the court failed to strike the special circumstance allegation. Accordingly, petitioner's contention must fail.

Petitioner also attempts to satisfy his burden by asserting that the prosecutor informed him that he would be paroled within ten years. Petn., P's & A's, p. 5. Respondents disagree.

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2. Petitioner also claims that the special circumstance allegation was used as a parole enhancement in a parole suitability hearing by the Board. This assertion will be addressed later in the argument. See Argument, Section IV, infra.

The record shows that at the time petitioner entered his plea, the prosecutor told him of the minimum and maximum prison terms he faced as a result of his plea. Exh. 8, R.T. 6. The prosecutor stated that the sentence on a second degree murder is fifteen years to life, but it was possible that petitioner could be released in less than fifteen years and as early as ten years. Id. The prosecutor fully informed petitioner of the possibility of parole but made no promises to petitioner. Id. Accordingly, respondents submit that petitioner received the benefit of his plea bargain and has failed to sustain his burden.

II

THERE WAS A FACTUAL BASIS FOR THE PLEA IN ACCORDANCE WITH CALIFORNIA PENAL CODE, SECTION 1192.5

Petitioner also contends that his plea must be withdrawn because of noncompliance with California Penal Code sections 1192.5 and 1192.6, regarding a factual basis for the plea. Petn., P's & A's, p. 5. Respondents disagree.

Penal Code sections 1192.5 and 1192.6 address plea agreements when a guilty or no contest plea is entered. The requirement under section 1192.5 is that the court shall inquire whether or not there is a factual basis for the plea. Section 1192.6 requires that the prosecutor state reasons for the recommended plea agreement.

In the instant case, a stipulation was entered into by petitioner's trial counsel and the prosecutor that there was a factual basis for the plea. Exh. 8, R.T. 9. Further, the court accepted the plea agreement and specifically found a factual basis for the plea. Exh. 8, R.T. 16. The trial court's use of a stipulation by counsel to establish the factual basis for the plea is appropriate under California law and is more than adequate to pass federal constitutional muster. People v. Enright, 132 Cal.App.3d 631, 634-5, 183 Cal.Rptr. 248 (1982).

Additionally, petitioner has completely failed to demonstrate that any prejudice occurred. In this regard, the analysis in People v. Dolliver, 181 Cal.App.3d 49, 61, 225 Cal.Rptr 920 (1986) is dispositive. In Dolliver, the court noted that, "Appellant does not allege that there was no factual basis for the plea, only that it was not placed upon the record of the plea proceeding. That is not enough. On a collateral attack such as this the defendant must establish that there was no factual basis for the plea, and in the absence of such of showing of actual prejudice, it is presumed that there was a factual basis for the plea."

As was the case in People v. Watts, 67 Cal.App.3d 173, 180-182, 136 Cal.Rptr. 496 (1977), the probation report herein abundantly established that there was a factual basis for petitioner's nolo contendere plea to second degree murder. Exh. 6.

As to petitioner's assertion of noncompliance with Section 1192.6 of the California Penal Code, it is well settled that the purpose of section 1192.6 is to enable the court to make an informed decision as to whether to approve or reject

a proposed plea agreement. People v. Cardoza, 161 Cal.App.3d 40, 45, 207 Cal.Rptr. 388 (1984). Moreover, the People of the State of California are the intended beneficiaries under 1192.6. Id. Accordingly, petitioner's claim should be rejected.

III

PETITIONER WAS PROPERLY SENTENCED TO A 15 YEAR TO LIFE TERM

Petitioner contends that the sentence of fifteen years to life must be stricken because the court at the time of sentencing did not say "life." Petn., P's & A's, p. 6. This contention is without merit.

The sentencing transcript of the July 22, 1982 proceedings reflects the following:

> "In this matter, for conviction of second-degree murder, the defendant will be sentenced to state prison for 15 -- he will be given credit for 700 days time actually served, 350 days good time or work credit for a total of 1,050 days, credit for time served." Exh. 9, R.T. 31.

Respondents submit that this appears to have been an unintentional interruption in thought on the judge's part. The official abstract of judgment and the minute order of July 2, 1982 illustrate that petitioner received a fifteen year to life

term. Exhs. 1, 2. The judge appears to have begun the pronouncement of sentence and was either interrupted or changed thoughts to insure that petitioner received the appropriate pre-sentence credits.

California Penal Code sections 12 and 13 provide that the trial court must impose the punishment prescribed by law. Accordingly, petitioner received a 15 year to life term under California Penal Code sections 190 and 1168, subdivision (b), as the court did not have authority to sentence petitioner to anything other that the statutory indeterminate term of fifteen years to life. Therefore, petitioner's contention is meritless.

IV

THE BOARD'S DETERMINATION OF PAROLE UNSUITABILITY WAS BASED UPON APPROPRIATE CRITERIA

Petitioner contends that the Board improperly relied upon his 1970 conviction and the probation report in determining parole suitability. Petn., p. 6; Petn., P's & A's, p. 5, 7, 10, 12. This contention is without merit.

California Penal Code section 3040 provides that the Board shall have the authority to allow prisoners to be released on parole. In fact, the Board's discretion in parole matters is "great," "almost unlimited" and is subject only to the existence of a factual basis and prisoner's right to procedural due process. In re Powell, 45 Cal.3d 894, 902, 248 Cal.Rptr 431 (1988). Relying on Superintendent v. Hill, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed. 2d 356 (1985), Powell held

that as long as there is "some evidence" to support the Board's finding, a decision based upon the exercise of its discretion would be upheld. In re Powell, 45 Cal.3d at p. 904. This is because an exercise of discretion requires a "deliberate assessment of a wide variety of individualized factors on a case-by-case basis, and the striking of a balance between the interests of the inmate and of the public." Id. at p. 902.

California Code of Regulations, section 2281(b) allows the Board to consider:

> "...[a]ll relevant, reliable information available to the panel ... in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history, past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." Cal. Code of Regs., tit. 15, §2281, subd. (b), emphasis added.

Due to the critical responsibility of the administration of the parole system, the Board is generally permitted to consider all relevant evidence, including hearsay. In re Carroll, 80 Cal. App.3d 22, 30-31, 145 Cal.Rptr. 334 (1978).

In the instant case, the Board considered a number of different documents in assessing petitioner's parole suitability. Exh. 4. The Board considered the criminal history of petitioner. Exh. 4., p. 4. The Board also considered the factual circumstances of the committing offense. Exh. 4. Petitioner asserts that the facts which were taken from the probation report were fabricated. However, as stated above, the Board is entitled to rely on that report, as probation reports are prepared under the authority of California Penal Code, section 1203, subdivision (b) and their use is sanctioned by law. Additionally, the Board considered the psychiatric evaluations of petitioner which did not support release. Exh. 4. Based upon on all of the above-mentioned factors, the Board found that petitioner posed a danger to society and stated specific reasons for its finding of unsuitability. Exh. 4. The consideration of these factors was consistent with the relevant law.

Moreover, the reasons stated for finding petitioner unsuitable for parole were also consistent with the regulations. California Code of Regulations, Title 15, section 2402, subdivision (b) states: "The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left the judgment of the panel. Circumstances tending to indicate unsuitability include:

(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner..

(C) The victim was abused, defiled or mutilated during or after the offense."...

(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim..."

The basis for the finding of unsuitability was clearly reflected in the record and is accord with the regulations. Therefore, the Board's determination that petitioner was unsuitable for parole was based upon specific criteria that was within its discretion to review. Accordingly, petitioner's contention that the Board used inappropriate criteria in his parole suitability hearing must fail.

V

THE SCHEDULING OF PETITIONER'S PAROLE SUITABILITY HEARING DID NOT CONSTITUTE AN APPLICATION OF AN EX POST FACTO LAW

Petitioner contends that the application of parole suitability guidelines which were not in effect at the time of

his offense in 1980 constitute an ex post facto application of the law. Petn., P's & A's, pp. 5, 8. Respondents disagree.

Parole suitability hearings are governed by California Penal Code, section 3041.5, subdivision (b)(2)B), which provides in pertinent part:

> "The board shall hear each case annually thereafter, except the board may schedule the next hearing no later than ... three years after any hearing at which parole is denied if the same prisoner has been convicted, in the same or different proceedings, of more that one offense which involves the taking of a life, and the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the basis for the finding." Emphasis added.

Petitioner was convicted of another murder in a different proceeding. Exh. 6. Penal Code section 3041.5 makes clear that petitioner need not have been convicted of more than one murder in the same case for the Board to schedule petitioner's next parole hearing three years in advance.

Petitioner's assertions that the parole suitability law is an application of an ex post fact law is meritless.

California Penal Code section 3041.5 was originally added by the Legislature as part of the Determinate Sentence Law in 1976. Cal. Stats. 1976, ch. 1139, § 281.8, pp. 51-52.

As enacted, that section provided in relevant part that the Board of Prison Terms was required to hold annual parole consideration hearings for life prisoners. Former Pen. Code § 3041.5(b)(2).

In 1981, the Legislature amended section 3041.5(b)(2) to permit the Board to postpone for up to three years the next parole consideration hearing for a life prisoner convicted, in the same or different proceedings, of more than one murder when the board finds that it was not reasonable to expect that the prisoner would be found unsuitable for parole in the interim. Cal. Stats. 1981, ch. 111, § 4, pp. 4339-3430.[3/]

It is well settled that a law is ex post facto if it punishes an act which was not punishable at the time it was committed or if it imposes an additional punishment to that which was prescribed at the time of the act. Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1980); Watson v. Estelle, 886 F.2d 1093, 1094 (9th Cir. 1989). The purpose of prohibiting ex post facto laws is to give individuals fair warning of the effect of their actions, to permit them to rely on the meaning of legislation until it is amended, and to restrain the government from enacting vindictive or arbitrary legislation. Id. at pp. 28-29.

In the case at bench, petitioner committed a murder in 1980, at a time when the punishment was an indeterminate sentence of 15 years to life in prison. Pen. Code §§ 190,

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3. In 1982, the California Legislature again amended section 3041.5(b)(2). That amendment is not at issue in this petition.

1168(B). Further, Penal Code section 3040 which authorizes the Board to determine when and if a life prisoner will be paroled was enacted in 1977. Exh. 11. Section 3041, which provides that a life prisoner will not receive a parole date until the Board determines that he is suitable for parole, was also enacted in 1977. Id. All of the relevant statutory provisions were therefore enacted prior to 1980 when petitioner committed the murder. Additionally, there was and is no requirement that petitioner be found suitable for parole. Greenholtz v. Nebraska Penal Inmates, 442 U.S.1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). Therefore, the amendments do not impose criminal liability for conduct which was innocent at the time it occurred.

The critical question in this case, as was true in Weaver, " ...is whether the new provision imposes greater punishment after the commission of the offense ... " Weaver v. Graham, 450 U.S. at p. 32, fn. 17. Thus, it is necessary to determine if the amendment challenged by petitioner in this case produced a more onerous result than the applicable law in effect at the time that petitioner and other similarly situated life prisoners committed their crimes. Weaver v. Graham, 450 U.S. at p. 30.

In the case at bench, there has been no substantive change in the guidelines under which petitioner has been and will be considered for parole suitability. The only change is in the frequency of the parole suitability hearings. The change in law is merely procedural and is therefore not an ex post facto violation. Weaver v. Graham, supra, at p. 29, fn. 12.

The California Court of Appeal is in agreement and held that the amendment to Penal Code section 3041.4 is "merely a procedural change that does not impact the inmates' substantial rights or increase their punishment." Morris v. Castro, 166 Cal.App.3d 33, 37, 212 Cal.Rptr 299, 302 (1985). The Morris court opined that the decision to defer the parole suitability hearing was made only after a full and fair hearing which reviewed and considered the inmate's criminal history, commitment offense, attitude toward his crime, behavior in prison, psychological and rehabilitation problems, age, parole plans as well as marketable skills. Id. at p. 38. Additionally, the deferral occurred because the Board determined that the inmate would pose an unreasonable risk of danger to the public if released. Id. The court stated:

> "We find the changes permitted by the amended statute are proper administrative and procedural methods for dealing with respondent life prisoners, who ... have committed multiple murders, and all of whom have demonstrated that they are unsuitable for early release on parole." Id.

The California Supreme Court likewise acknowledged the procedural-substantive distinction but believed this distinction should be used with great caution, since it is often one of degree, and in close cases such a distinction may well turn on factors as subtle as the court's sense of fair play and justice. In re Jackson, 39 Cal.3d 464, 471-472, 216 Cal.Rptr. 760 (1985).

The Jackson court went on to find that Penal Code section 3041.4 was a procedural change outside the purview of the ex post facto law because the amendment did not alter the criteria by which parole suitability is determined, it did not change the criteria governing the inmate's release on parole and it did not entirely deprive the inmate of the right to a parole suitability hearing. Rather, the amendment changed only the frequency with which such hearings need be held. Id. at pp. 472-473.

The Ninth Circuit has also found that the enactment of the revision of section 3041.5 did not amount to a more onerous penalty. Watson v. Estelle, 886 F.2d 1093, 1096-7 (9th Cir. 1989). In the Watson case, the petitioner had been convicted of multiple murders and sentenced to the death penalty. However, the death penalty was subsequently invalidated by the California Supreme Court and Watson's sentence was reduced to life imprisonment with the right to parole. Although the petitioner in Watson had no expectation of regular parole consideration hearings at the time he committed the crime, he was subsequently afforded periodic parole consideration hearings with the enactment of Penal Code section 3041.5. That placed him in the same position as petitioner in the case at bench. The 1981 amendment to Penal Code section 3041.5 is retrospective as to both the petitioner in Watson and the instant petitioner. The Ninth Circuit determined that the petitioner in Watson was not disadvantaged by its application. Id. The court determined that the law did not fail to apprise him of the "grave consequences of this conduct" and, as a result, any subsequent parole eligibility could hardly be considered more onerous.

The situation presented in the instant case is distinguishable from both Rodriguez v. United States Parole Commission, 594 F.2d 170 (7th Cir. 1979) and Tiller v. Klincar, 149 Ill.2d 206, 561 N.E. 2d 576, 580 (1990).[4/]

In the Rodriguez case, Rodriguez had been sentenced to a maximum term of two years in prison under a statute which made him immediately eligible for parole. At the time Rodriguez committed his crimes, the parole regulations required that the parole board hold a parole hearing for prisoners sentenced under that statute at the one-third point of their sentence in addition to a much earlier hearing at which few prisoners were ever granted parole. Id. at p. 176.

After petitioner Rodriguez committed his crimes, the parole regulation was revised, eliminating the one-third hearing requirement and replacing it with one which called for additional review hearings to be held not less frequently than 18 months after the initial hearing. Id. at p. 172.

The Seventh Circuit held that the regulation's application to Rodriguez violated the constitutional proscription against ex post facto laws, not simply because it changed the frequency of parole hearings, but because in the case of prisoners with short sentences, the regulation denied

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4. Respondents mention cases from other jurisdictions because in response to previous petitions submitted by petitioner, the court requested that the holdings of these particular cases be addressed.

them any opportunity for release on parole prior to the expiration of their maximum sentences. Id. at p. 176.

In Tiller v. Klincar, 149 Ill.2d 206, 561 N.E.2d. 576, 580 (1990), the court interpreted the delay in parole hearings as being an ex post facto law because it disadvantaged the petitioner. The facts set forth in Tiller do not make it possible to readily compare all the relevant statutes of Illinois to those of California. The statute in the instant case is distinguishable because California Penal Code section 3041.5 (b)(2)(B) applies only to those life prisoners who have committed more than one murder. Furthermore, the Tiller court did not examine what criteria is utilized in Illinois to determine parole suitability or whether the criteria changed with the amendment of the time for parole review hearings. Moreover, the Tiller court relied on the rationale of Rodriguez which has significant factual differences. Finally, the opinion of a foreign state should be given little weight in light of the fact that the California Court of Appeal, the California Supreme Court and the Ninth Circuit are all in harmony on this issue.

Accordingly, respondents submit that there is no ex post facto application of California Penal Code section 3041.4 and therefore petitioner's contention must fail.

VI

THE BOARD DID NOT UTILIZE A BASE TERM MATRIX

Petitioner contends that the Board's use of the parole eligibility matrix constitutes an ex post facto application of the law. Petn., P's & A's, p. 5.

Presumably, the matrix to which petitioner refers is the one set forth in California Code of Regulations, Title 15, Section 2403 which determines the base term for life prisoners. Petitioner's allegation is without merit because the Board did not use the matrix in determining petitioner's parole unsuitability status. Until such time as petitioner is found suitable for parole no base term will be set. Calif. Code of Regs., tit. 15, § 2403; Penal Code §§ 3040, 3041. Because the matrix which petitioner is apparently alluding to was not considered in his parole suitability hearing, his contention is completely meritless.

VII

PETITIONER IS NOT ENTITLED TO A PAROLE RELEASE DATE UNTIL THE BOARD DETERMINES THAT HE IS SUITABLE FOR RELEASE ON PAROLE

Petitioner contends that a fifteen year to life term was not intended under Penal Code section 1168(b) to warrant a straight life term. Petn., P's & A's, p. 6. Petitioner also

contends that he must be paroled in ten years under California Penal Code section 190. Petn., P's & A's, p. 6. Petitioner further contends that his term of imprisonment is controlled by California Penal Code sections 2930 and 2931 after Proposition 7. Respondents disagree and assert that petitioner has a fundamental misunderstanding of California sentencing and parole laws.

The United States Supreme Court has determined that "[t}here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Nebraska Penal Inmates, supra, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed. 2d 668 (1979). A state may create a liberty interest sufficiently embraced within the concept of Fourteenth Amendment "liberty" to entitle an inmate to minimal procedures to insure that such interest is not arbitrarily abrogated. Wolff v. McDonnell, 418 U.S. 539, 557, 94 S.Ct. 2963, 41 L.Ed.2d 935, 951 (1974). However to state a claim for denial of a due process interest arising under state law, the state law at issue must create a legitimate claim of entitlement to the interest rather than merely an abstract desire for it. Greenholtz, 442 U.S. at 7.

Under California's prior sentencing procedure, the Indeterminate Sentencing Law (ISL), the Adult Authority rather than the court fixed the actual length of prison terms.[5/]

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5. The Adult Authority was the predecessor agency of the Board of Prison Terms.

In 1977, the ISL was repealed and the Determinate Sentencing Law (DSL) became effective. See Penal Code §§ 1170 et. seq.

The DSL provided for two separate sentencing procedures. The first procedure provided that the courts would fix the actual length of term for any individual who committed an offense, "for which any specification of three time periods of imprisonment ... is now prescribed by law or for which only a single term of imprisonment in state prison is specified ... " §§1168(a) §1170(h).

The second sentencing procedure involves prisoners convicted of certain felony offenses such as first or second degree murder for which life imprisonment can be imposed. Under section 1168(b), a prisoner not subject to the three term or single-term sentencing format of 1168(a) does not received a term fixed by the court. Section 3040 provides that the Board, rather than the courts, has the power to parole prisoners sentenced to indeterminate terms under section 1168(b).

In the present case, petitioner was convicted of second degree murder, a violation of section 187. Section 190(a) provides the punishment for second degree murder. This section obviously does not prescribe a choice of three terms or a single term of imprisonment as required for sentencing under 1168(a). Thus, the sentencing procedures set forth in sections 1170 et. seq. do not apply.

Rather, the 15 year to life term, an indeterminate term, falls within the criteria in section 1168(b). Therefore,

the court did not fix petitioner's term and only the Board is authorized to determine if, and when, petitioner will be released on parole.

Petitioner's assertion that he was not sentenced under 1168(b) is meritless. He was given a fifteen year to life term, and all prisoners sentenced to indeterminate terms of 15 years to life under section 190(a) are subject to 1168(b) sentencing procedures. Any claim that life does not mean "natural life" is complete nonsense.

Petitioner also appears to assert that section 1168(b) was repealed when Proposition 7 became effective. Proposition 7 was passed by the voters of California in November, 1978 and is now encompassed in section 190. Nothing in Proposition 7 or in section 190 repeals section 1168(b). On the contrary, section 1168(b) and sections 3040 and 3041, provide the exclusive procedure for parole release for prisoners sentenced to indeterminate terms of 15 years to life for second degree murder. Moreover, case law supports the plain meaning and intent of the DSL. See In re Monigold, 205 Cal.App.3d 1224, 1227, 253 Cal.Rptr. 120 (1988); People v. Day, 117 Cal.App.3d 932, 937, 173 Cal.Rptr. 9 (1981).

Finally, petitioner asserts that his term of imprisonment is controlled by Penal Code section 2930 and 2931 and he must be paroled in ten years under section 190. Petn., p. 7; Petn, P's & A's, p. 7. Petitioner is mistaken.

The Board recognized that petitioner is serving an indeterminate term and is not suitable for parole because he

continues to pose an unreasonable risk of danger to society if released on parole. Exh. 4. Until the Board determines that petitioner is suitable under the previously mentioned factors, he is not entitled to a parole date. Therefore, he has no right to a parole date at a fixed time. In re Schoengarth, 66 Cal.2d 295, 300, 57 Cal.Rptr. 600, 603 (1967); In re Duarte, 143 Cal.App.3d 943, 946-7, 193 Cal.Rptr. 310, 313 (1983).

Contrary to petitioner's assertions, Penal Code section 2931 allows only for the calculation of earned credits in order to determine the minimum eligible parole date. See Exh. 7. Section 190 only allows for the use of reduction credit in accordance with section 2930 et. seq. Therefore, petitioner's contentions are completely meritless.

VIII

THE BOARD DID NOT CONSIDER THE TESTIMONY OF LARRY WILSON IN ARRIVING AT ITS DETERMINATION OF PAROLE UNSUITABILITY

In a very convoluted fashion, petitioner asserts that the testimony of Larry Wilson was used against him by the Board in his parole review hearing. Petn., P's & A's, p. 17. Petitioner's assertion is erroneous.

A review of the factors which the Board considered in the parole review hearing indicate that the testimony of Larry Wilson was not a factor considered by the Board. Exh. 4. Accordingly, petitioner's contention has no merit.

CONCLUSION

For all the reasons stated, respondents respectfully request that the petition for writ of habeas corpus be denied and the order to show cause discharged.

DATED: February 24, 1992.

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief Assistant
Attorney General
JAMES J. PETZKE, Supervising
Deputy Attorney General

By: _____
ROBIN M. MILLER,
Deputy Attorney General

Attorneys for Respondents

CALIFORNIA BOARD OF PRISON TERMS

In the Matter of the
Hearing of

Life Prisoner

MORALES, Pablo
B-33187

Initial Parole Consideration
Denied (3 Years)

CTF

This matter was heard before the Board of Prison Terms (BPT) on July 25, 1989, at the Correctional Training Facility. The hearing panel was composed of W. Morgan, Commissioner; E. Tong, Commissioner; and J. Thompson, Deputy Commissioner.

Present at the hearing were: P. Morales, Prisoner; S. Cole, Counsel for Prisoner; and L. Diamond, Deputy District Attorney, Los Angeles County.

Any others present are identified in the transcript.

Oral and documentary evidence was submitted and after due consideration of all the evidence, the panel makes the following findings:

Legal Status

On July 13, 19982, the prisoner was received in prison pursuant to Penal Code (PC) §1168 for a violation of PC §187, second degree murder (Los Angeles County Case No.

A-361773, Count 1). The controlling minim eligible prole date is August 2, 1990.

PC §3041(a) provides that the BPT shall meet with persons sentenced under PC § 1168 and shall normally set a parole release date unless, pursuant to PC §3041(b), the Board determines that a parole date cannot be fixed at this hearing.

This hearing is conducted pursuant to Title 15, California Code of Regulations (CCR), Division 2, Chapter 3, Article 5, which sets forth parole consideration criteria and guidelines for life prisoners implementing PC §3041.

Statement of Facts

The victim in this offense was Lois Washabaugh, a 75-year-old female. The victim was a widow and lived in a mobile home in Soquel, California. She had become interested in prison reform and started visiting prison inmates including the prisoner who she saw frequently while he was incarcerated in Soledad.

The prisoner was transferred to the Los Angeles area half-way house on April 14, 1980, and in anticipation of his upcoming parole the victim visited Los Angeles for one day on April 30, 1980, and secretly married him. On July 4, 1980, she left her mobile home in Soquel, California and told friends that she was moving to Los Angeles to live with her husband.

On July 7, 1980, a human hand was found by officers of the Los Angeles Police Department in the traffic lane on the northbound Hollywood freeway at Vermont. A missing

persons report had been filed on the deceased on or about the end of July of 1980 and an investigation as to her disappearance was initiated by detectives from Los Angeles Police Department Robbery/Homicide Division and the Santa Cruz Sheriff's Department. On August 7, 1980, investigation disclosed through fingerprint identification that the human hand that was found on the freeway was that of Mrs. Washabaugh. After the hand was found it was learned that the prisoner had obtained possession of the victim's vehicle and had used her credit cards, forging her name. The prisoner was subsequently taken into custody at Wells Bailbonds office at 212 East Regent Street where he lived. At the time of the arrest the prisoner was in possession of the victim's car, purse, credit cards and diamond rings. The victim's body has never been found.

Parole Suitability

CCR §2281(a) requires that the panel first determine whether the prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison. CCR §2281(c) sets forth circumstances tending to show unsuitability and CCR §2281(d) sets forth circumstances tending to show suitability. These regulations are guidelines only.

The panel relied on the following circumstances in determining whether or not the prisoner is suitable for parole:

1. Commitment offense. The offense was carried out in an especially heinous, atrocious and cruel manner which exhibits a callous disregard for the life or suffering of another. The victim was mutilated during or after the offense and the motive of the crime if very trivial in relation to the offense.

These conclusions are drawn from the Statement of Facts wherein the prisoner after killing the victim proceeded to mutilate the body.

2. Previous record. The prisoner has a record of violence and assaultive behavior and an escalating pattern of criminal conduct and violence. He has an unstable social history, he has failure previous grants of parole and he cannot be counted upon to avoid criminality. He has failed to profit from society's previous attempts to correct his criminality which include being on parole and then committing another offense.

The prisoner has an unstable social history and prior criminality which includes being found guilty of first degree murder, later being granted parole and then committing a second murder. Both being female victims intimately associated with the prisoner.

3. Institutional behavior. The prisoner has programmed in a limited manner while incarcerated and he has not participated in beneficial self-help or therapy programs.

4. Psychiatric factors. The Psychiatric Evaluations dated April 12, 1989, by Clyde V. Martin, M. D., Staff Psychiatrist, and May 31, 1985, by Philip S. Hicks, M. D., Staff Psychiatrist, are not totally supportive of release. The subject's criminal

behavior is directly related to his psychopathology. The reports states as follows:

"A characteristic of an individual with this diagnosis is to avoid conflict whenever possible, but when 'against the wall' to quickly revert to primitive, often violent, behavior, sometimes with little or no recollection of the violent event."

"If parole is to be considered it is felt that his violence potential is greater than the average inmate because of his two murders."

The panel finds the prisoner needs therapy in order to face, discuss, understand and cope with his past criminal behavior and reasons for the life crime. Until progress is made, he continues to be unpredictable and a threat to others.

The prisoner needs therapy in a controlled setting, but his motivation and amenability are questionable.

The prisoner is commended for completing a course in computer technology, for remaining disciplinary free and for receiving laudatory work chronos.

Based on the information contained in the record and considered at this hearing, the panel concludes and states, as required by PC §§3043 and 3043.5, that the prisoner would pose a threat to public safely if released on parole.

Therefore, the prisoner is found unsuitable for parole.

PC §3041.5(b)(2) permits a three year denial if a prisoner has been convicted, in the same or different proceedings, of more than one offense which involves taking a life and the Board finds that it is not reasonable to expect that parole would be granted at a hearing during the intervening years. In addition to the foregoing reasons supporting postponement of parole consideration, the panel also specifically finds that it is not reasonable to expect that parole would be granted at a hearing scheduled earlier based on the following facts:

1. The prisoner committed the offense in an especially heinous, atrocious and cruel manner wherein he mutilated the vitim's body after causing said death and, as such, requires a longer period of observation and/or evaluation before the Board can project a parole date.

2. The prisoner has a prior record of violent behavior, to wit, he was convicted of first degree murder in 1970.

3. In view of the prisoner's long history of criminality and misconduct, which includes the aforementioned murder, a longer period of time is required to evaluate his suitability.

4. The recent Psychiatric Evaluations dated April 12, 1989, but Clyde V. Martin, M.D., Staff Psychiatrist, and May 31, 1985, by Philip S. Hicks, M.D., Staff Psychiatrist, indicate a need for a longer period of observation and evaluation or treatment.

The next hearing will be scheduled in three years.

Recommendation

PC §3041.5(b)(2) provides that within 20 days following any meeting where a parole date has not been set, the Board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date and when the prisoner can reasonably expect to be considered again for the setting of a parole date and in what beneficial activities the prisoner might participate.

This case shall be scheduled for hearing for parole consideration as provided in 15 CCR §2270(c).

In preparation for the next parole consideration hearing, the panel recommends that the prisoner:

1. Remain disciplinary free.

2. Participate in self-help and/or therapy programming.

3. Involve himself in alcohol abuse programming and authenticate records of educational pursuits.

Order

Based on the foregoing findings and reasons, parole is denied.

EFFECTIVE DATE OF THIS DECISION AUG 22 1989

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
PROBATION OFFICERS REPORT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff

vs.

PABLO JOSE ANTONIO MORALES,
Defendant.

RUE NAME AKA:
PAUL ANTHONY MOKELE,
PAUL SIKUKUNI

Charged With the Crime(s) of
187 PC (MURDER WITH PREVIOUS MURDER CONV.) PER 190.2(A)(2).

Convicted of the Crime(s) of
187 PC, SEC. DEG.

R E P O R T
SEQUENCE
No. Dept. 120

Atty. De Blanc

Judge Ricks

Hearing
6-18-82

C.I.I.
 # 3758624

Court Case No.
A-361773

DPO D. Feldman

Area Office CAI

Prob. No. X-91193

Address (if in custody, expected address when released)

**COUNTY JAIL,
BKG NO. 5812477**

By Plea

Days in Jail This Case - Approx 700

Companion Cases	Disposition
None	N/A

PERSONAL HISTORY

Age	Birthdate	Race	Formal Educ.	Age Left School
41	4-4-40	Black	Unknown See Report	Unknown

Marital Status	Home Included	No. of Dependents
Single	(Last) Defendant	None

Occupation	Income Per Month	Where Employed
None	None	Unemployed

Health	Came to State	Came to County	Branch of Mil. Service
Good	1967	1968	None

Kind of Discharge
N/A

(AS SUPPLIED BY DEFENDANT, PROBATION FILES, DEPARTMENT OF CORRECTIONS, AND INTERESTED PARTIES.)

IT SHOULD BE NOTED THAT NO VERIFIABLE INFORMATION HAS EVER BEEN OBTAINED REGARDING THE DEFENDANT'S BACKGROUND AND NOTHING IS KNOWN ABOUT HIM PRIOR TO 1970 WHEN HE WAS CONVICTED FOR MURDER. IN THE PAST AS WELL AS CURRENTLY, ALL EFFORTS TO OBTAIN VERIFIABLE INFORMATION REGARDING HIS PERSONAL HISTORY AND FAMILY HAVE BEEN UNSUCCESSFUL.

THROUGH THE YEARS THERE HAVE BEEN SOME CHANGES IN THE DEFENDANT'S VERSION OF HIS BACKGROUND. HE HAS CONSISTENTLY ALLEGED BIRTH IN PUERTO RICO. CURRENTLY HE CLAIMS THAT HE WAS ONE OF THREE CHILDREN, AND HAS ONE BROTHER AND ONE SISTER. HOWEVER, IN PREVIOUS PRE-SENTENCE INVESTIGATIONS DEFENDANT SAID THAT HE WAS THE YOUNGEST OF THREE SONS AND ALSO CLAIMED THAT HE HAD TWO BROTHERS FOLLOWING COMMITMENT TO STATE PRISON. HE CLAIMS NO KNOWLEDGE OF THE ADDRESS OF EITHER OF HIS SIBLINGS.

ALLEGEDLY HE WAS BROUGHT TO NEW YORK BY HIS PARENTS WHEN HE WAS 12 YEARS OLD. CURRENTLY HE STATES THAT HIS FATHER, WITH WHOM HE LAST HAD CONTACT IN 1965, IS NOW DECEASED AND REPORTS THAT HIS MOTHER DIED FOLLOWING A CAR ACCIDENT IN 1966, BUT COULD NOT PROVIDE EXACT DATES OF THE DEATH OF EITHER PARENT. FOLLOWING COMMITMENT TO STATE PRISON HE CLAIMED THAT HIS FATHER BECAME AN ALCOHOLIC AFTER THE FAMILY MOVED TO NEW YORK WHICH RESULTED IN THE BREAK-UP OF THE FAMILY AND RELATED THAT HIS MOTHER LATER LIVED WITH A BOYFRIEND. HE NOW REITERATES THAT HIS PARENTS DID SEPARATE WHEN HE WAS 13, BUT ALLEGES NO KNOWLEDGE THAT HIS FATHER WAS AN ALCOHOLIC OR HIS MOTHER'S SUBSEQUENT ACTIVITIES AND/OR RELATIONSHIPS. HE ALLEGES THAT HIS FATHER WAS BORN IN PUERTO RICO AND HIS MOTHER IN THE VIRGIN ISLANDS. (IT SHOULD BE NOTED THAT THE DEFENDANT HAS WHAT APPEARS TO BE A SLIGHT WEST INDIAN ACCENT.) WHILE IN STATE PRISON DEFENDANT SAID THAT HE HAD BEEN SELF-SUPPORTING SINCE AGE 13, FIRST STARTED WORKING AS A SHOESHINE BOY SELLING PAPERS ON THE STREET CORNERS OF NEW YORK. HE NOW STATES THAT AFTER HIS PARENTS SPLIT UP HE LIVED WITH AN UNCLE, RAYSHALL CORDEZA, BUT COULD PROVIDE NO INFORMATION AND DESCRIBED HIMSELF AS "A STREET KID."

SEEMINGLY NO VERIFIABLE INFORMATION IS AVAILABLE REGARDING THE DEFENDANT'S EDUCATION. DURING PREVIOUS PRE-SENTENCE INVESTIGATIONS, THE DEFENDANT CLAIMED THAT HE QUIT SCHOOL IN THE SIXTH GRADE WHILE IN NEW YORK AT AGE 13 TO GO TO WORK. hOWEVER, AT THIS TIME THE DEFENDANT STATES THAT HE NEVER ATTENDED SCHOOL IN NEW YORK, AND NOW ALLEGES THAT WHILE HE WAS IN SAN QUENTIN HE TOOK 60 UNITS AND RECEIVED A BACHELOR OF ARTS DEGREE FROM FRANCONI, A COLLEGE, NEW YORK. INVESTIGATION REVEALS THAT THIS IS A NONEXISTENT COLLEGE - DEFENDANT SENT FOR A MAIL ORDER CERTIFICATE.

WHILE PREPARING HIS "PERSONAL RESUME" BEFORE HE WAS PAROLED FROM PRISON, HE ALLEGED A BACHELOR OF ARTS DEGREE IN SOCIAL SCIENCE AND POLITICAL HISTORY IN 1978 AND A GRADUATE DEGREE AND CERTIFICATE AND HIGH SCHOOL ACCOUNTING FROM BAYVIEW HIGH SCHOOL IN CALIFORNIA AND "SELF-TAUGHT" PARALEGAL TRAINING FROM 1971 TO 1980 (WHILE HE WAS IN PRISON) PLUS BACHELOR OF SCIENCE GRADUATE DEGREE IN LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE FROM TENNESSEE CHRISTIAN UNIVERSITY, CHATTANOOGA, TENNESSEE. IN ADDITION, HE DESCRIBED HIMSELF AS "A LAW CLERK" FROM 1971 TO 1980 (WHILE HE WAS IN PRISON) WHICH HE ALLEGED THAT HIS DUTIES INCLUDED HOSPITAL

CLERK, EDUCATION RECORDS CLERK, ACCOUNTING CLERK, AND LAW CLERK WHICH CONSISTED OF A FULL RANGE OF GENERAL, CIVIL, AND CRIMINAL LAW INCLUDING COUNSELLING, LEGAL RESEARCH, DRAFTING OF LEGAL PLEADINGS, AND LEGAL MEMORANDUMS, ETC. HE EXPRESSED GOALS TO FURTHER HIS EDUCATION IN THE ACADEMIC AND LEGAL FIELD WITHIN VOCATIONAL REHABILITATION OR SOCIAL WORK AND TO ULTIMATELY EARN A LAW DEGREE, AND OBTAIN EMPLOYMENT WITH THE COUNTY, STATE, AND FEDERAL AGENCIES OR WITHIN THE CRIMINAL JUSTICE SYSTEM IN PRIVATE OR PUBLIC ORGANIZATIONS. PRIOR TO HIS PAROLE, THE DEFENDANT SENT APPLICATIONS OF EMPLOYMENT ON AUGUST 30, 1979 TO THE LOS ANGELES COUNTY PROBATION DEPARTMENT AS "PROBATION TRAINEE" AND ALSO INDICATED A DESIRE TO PARTICIPATE IN VOLUNTEER ORIENTATION CLASSES WITHIN THE VOLUNTEERS IN SERVE TO OTHERS (VISTO) PROGRAM. IN JULY OF 1979 HE SENT A LETTER THAT HE WAS TRYING TO MOVE TO A HALF-WAY HOUSE LOCATED WITHIN A DISTANCE FROM ANY BRANCH OF THE VISTO PROGRAM AND THE FOLLOWING MONTH SENT ANOTHER LETTER INDICATING THAT HE WAS ELIGIBLE FOR WORK FURLOUGH AND REQUESTED THAT MATERIALS BE SENT TO HIM REGARDING THE PROGRAM. IN CORRESPONDENCE SENT TO THE LOS ANGELES COUNTY PROBATION DEPARTMENT IN CARE OF THE VISTO PROGRAM IN NOVEMBER OF 1976 HE ALLEGED THAT HE HAD A BACHELOR DEGREE IN

SOCIAL HISTORY AND WAS THEN ENROLLED IN CALIFORNIA STATE UNIVERSITY - DOMINGUES HILL IN THE MASTERS OF HUMANITIES EXTERNAL DEGREE PROGRAM AND HAD A "FUNDING PROBLEM WITH CAL STATE". IN CORRESPONDENCE HE NOTED THAT HIS PREFERENCE IN THE VISTO PROGRAM WAS TO ASSIST PROBATION OFFICERS IN PREPARING "CUMULATIVE CASE SUMMARIES, PROFESSIONAL INVESTIGATORY PROCEDURES WITH ANY KIND INCLUDING JOB PLACEMENTS, ETC."

NOTHING IS KNOWN OF THE DEFENDANT'S EMPLOYMENT. HE NOW STATES THAT HE LEFT NEW YORK CITY AT THE END OF 1956, TRAVELLED BOTH IN THE UNITED STATES AND ELSEWHERE AND HAD A VARIETY OF JOBS NONE OF WHICH CAN BE VERIFIED.

AFTER HE WAS PAROLED IN APRIL OF 1980, THE DEFENDANT WORKED AS A BAILBOND "CONSULTANT" FOR WELLS BAILBOND AT 212 EAST REGENT STREET IN INGLEWOOD WHERE HE LIVED AND WAS ARRESTED.

THE DEFENDANT HAS NEVER FATHERED ANY CHILDREN AND HIS ONLY MARRIAGE WAS TO THE VICTIM IN THIS OFFENSE, LOIS WASHABAUGH, A 75-YEAR-OLD CAUCASIAN, WHOM HE MET WHEN SHE VISITED PRISON INMATES. SHE HAD VISITED HIM FREQUENTLY IN PRISON IN SOLEDAD AND ALLEGEDLY TRIED TO CONVERT HIM TO HER RELIGION, CHRISTIAN SCIENCE. SHE LIVED IN A

MOBILE HOME IN SOQUEL, CALIFORNIA. AFTER THE DEFENDANT WAS TRANSFERRED TO LOS ANGELES TO A HALF-WAY HOUSE ON APRIL 14, 1980 IN ANTICIPATION OF HIS UPCOMING PAROLE, SHE VISITED HIM IN LOS ANGELES FOR ONE DAY ON APRIL 30, 1980 AND SECRETELY MARRIED HIM. SHE THEN RETURNED TO HER HOME IN NORTHERN CALIFORNIA AND SHE TOLD FRIENDS THAT SHE WAS MOVING TO LOS ANGELES TO LIVE WITH THE DEFENDANT. SHE LEFT HER HOME JULY 4, 1980 AND WAS REPORTED MISSING BY HER FAMILY JULY 31, 1980. THREE DAYS LATER LEFT HAND WAS FOUND ON THE FREEWAY, WHICH ULTIMATELY LED TO THE DEFENDANT'S ARREST AND PROSECUTION IN THIS CASE.

NO HEALTH PROBLEMS ARE REPORTED AND THE DEFENDANT IS OF ESTIMATED AVERAGE INTELLIGENCE.

THE DEFENDANT STATES THAT HE WAS RAISED A METHODIST, BUT BECAME A MUSLIM SIX YEARS AGO, AND NOW ATTENDS "ALL SERVICES." HE HAS NO PARTICULAR HOBBIES OR RECREATIONAL INTERESTS.

FINANCIAL SITUATION:

THE DEFENDANT DENIES ANY FINANCIAL RESOURCES OR INDEBTEDNESS.

SUBSTANCE USE:

EXCEPT FOR MARIJUANA WHICH HE SMOKED WHEN HE WAS VERY YOUNG (AGE 15) DEFENDANT DISCLAIMS ILLEGAL USE OF ALL NARCOTICS AND DRUGS, AND STATES THAT HE HAS ABSTAINED FROM INTOXICANTS SINCE 1970.

GANG ACTIVITY:

INVESTIGATION REVEALS NO INFORMATION REGARDING GANG ACTIVITY.

ARREST RECORD:

SOURCES OF INFORMATION:

CII (5-17-82).
ALIAS: PAUL ANTHONY MOKELE.

10-20-66 ROYAL CANADIAN MOUNTED POLICE/OTTAWA, ONTARIO, CANADA - INQUIRY - NO FURTHER DISPO.

(ACCORDING TO DEFENDANT, HE WENT TO CANADA FOR A VISIT AND HAD NEW YORK PLATES AND WAS ARRESTED FOR SPEEDING AND USED A "NICKNAME" AND RELEASED AFTER "MAKE" WAS RUN.)

(A PHONE CALL WAS MADE TO RCMP IN OTTAWA FOR POSSIBLE FURTHER INFORMATION

REGARDING THIS ARREST IN WHICH THE DEFENDANT USED THE NAME OF PAUL ANTHONY MOKELE. IT WAS REPORTED THAT NO FURTHER INFORMATION WAS AVAILABLE UNLESS A COPY OF THE DEFENDANT'S FINGERPRINTS COULD BE SENT. A COPY OF THE DEFENDANT'S FINGERPRINTS WAS REQUESTED FROM THE FBI WHICH TO DATE HAS NOT BEEN RECEIVED.)

3-25-69 PD, BERKELEY - 647(G) PC (PROWLING) - 4-22-69, 30 DAYS SUSPENDED.

(DEFENDANT SAID THAT HE WENT TO A PARTY AND LEFT, THEN RETURNED AND EVERYONE WAS GONE. SOMEONE ACCUSED HIM OF BEING A BURGLAR.)

10-4-69 SO, FORT PIERCE, FLA. - SPEEDING - NO DISPO.

(DEFENDANT STATES THAT HE WAS DELIVERING A CAR FROM SAN FRANCISCO TO FLORIDA, AND HAD NO MONEY FOR A FINE, AND CALLED THE OWNER OF THE CAR WHO SENT HIM MONEY.)

11-4-69 LAPD - 459 PC (BURGLARY) - PLEADED GUILTY TO 647(G) PC (LOITERING/PROWLING) - 90 DAYS SUSPENDED, 12 MOS. SUMMARY PROB., $60 FINE OR 12 DAYS; 415 PC DISM.

(DEFENDANT SAID THAT HE WAS GOING TO A FRIEND'S HOUSE, DID NOT KNOW THE ADDRESS,

AND KEPT KNOCKING ON DOORS. DENIED THAT HE WAS PLACED ON SUMMARY PROBATION.)

(DURING PREVIOUS PRE-SENTENCE INVESTIGATIONS THE DEFENDANT SAID THAT HE HAD ATTENDED A PARTY AND BECAME INTOXICATED, WENT OUT TO GET SOME MORE WHISKEY AND WHEN HE RETURNED APPARENTLY THE PEOPLE HAD LEFT AND HE KNOCKED ON THE DOOR, WENT AROUND TO THE SIDE, BUT COULD GET NO ANSWER. SOMEONE NOTICED HIM AND REPORTED HIM TO THE POLICE AND SAID THAT HE PLEADED GUILTY TO GET OUT OF JAIL BECAUSE HE WAS TIRED OF IT.)

3-7-70 LAPD - 245 PC (ADW) - 3-9-70 RELEASED, COMPLAINANT REFUSED TO PROSECUTE

(DEFENDANT CLAIMS THAT HE SURRENDERED TO THE POLICE ALTHOUGH RECORDS NOTE THAT HE WAS ARRESTED AT HIS RESIDENCE. HE STATES THAT HE AND A MALE FRIEND GOT INTO A FIGHT. HE SAID THAT HE HIT THE GUY AND HE THOUGHT THE GUY WOULD REPORT THE MATTER FIRST.)

7-27-70 LAPD - 187 PC (MURDER) - A-262330, CONV., BY JURY OF FIRST DEG. MURDER. FIXED SENTENCE AT LIFE IN PRISON: 3-11-71 SENTENCED TO PRISON FOR LIFE; RECEIVED DEPT. CORR. 3-19-71, FIRST DEG. MURDER

FROM L.A. CO.; TERM: LIFE; 4-14-80 RELEASED TO WORK FURLOUGH PAROLE, L.A. CO.; 6-22-80 PAROLED FROM WORK FURLOUGH PAROLE TO L.A. CO.

(THIS REFERS TO THE PRIOR MURDER CONVICTION CHARGED IN THE INFORMATION IN THE PRESENT OFFENSE.)

(THE VICTIM IN THIS OFFENSE WAS GINA WALLACE, APPROXIMATELY 35 YEARS OF AGE AT THE TIME OF HER DEATH. HER BODY WAS FOUND BY A REAL ESTATE AGENT ON 7-14-70 IN AN ABANDONED MEDICAL BUILDING SHE WAS SHOWING TO A PROSPECTIVE TENANT. THE DECEASED HAD BEEN SHOT IN THE HEAD, NECK, AND ABDOMEN, AND THE RIGHT THUMB HAD BEEN AMPUTATED. A BLOOD FINGERPRINT WAS OBTAINED FROM THE DOORKNOB LEADING TO THE BATHROOM A THE LOCATION WHERE THE BODY WAS FOUND. SINCE THE BODY WAS NOT IDENTIFIED AT THE TIME OF DISCOVERY, PICTURES WERE CIRCULATED AND PUBLISHED IN LOCAL NEWSPAPERS AND THE DECEASED WAS IDENTIFIED BY A NEIGHBOR. INVESTIGATION DISCLOSED THAT THE DECEASED HAD BEEN LIVING WITH THE DEFENDANT FOR SEVERAL MONTHS PRIOR TO HER MURDER. AFTER HIS DISAPPEARANCE, THE DEFENDANT EXPLAINED HER ABSENCE TO ACQUAINTANCES IN VARIOUS WAYS ALLEGING THAT SHE HAD GONE TO SOUTH CAROLINA, HAD GONE TO PHILADELPHIA TO GET

A DIVORCE, AND HAD GONE TO PHILADELPHIA TO SEE HER MOTHER WHO WAS NEAR DEATH.

(AN AUTOPSY REPORT DISCLOSED THAT THE CAUSE OF DEATH WAS DUE TO GUNSHOT WOUNDS TO THE HEAD, SEVERING THE SPINAL CORD, CAUSING INSTANTANEOUS DEATH. AFTER SHE WAS DEAD THE DEFENDANT MUTILATED THE BODY BY REPEATEDLY SLASHING HER FACE IN ADDITION TO CUTTING OFF THE RIGHT THUMB WHICH WAS NEVER FOUND. THE DEFENDANT WAS ARRESTED AT THE RESIDENCE HE SHARED WITH THE DECEASE. FOLLOWING HIS ARREST IT WAS DETERMINED THAT HIS FINGERPRINTS MATCHED THOSE OF THE FINGERPRINTS FOUND AT THE LOCATION WHERE THE DECEASED'S BODY HAD BEEN DISCOVERED. IT WAS DETERMINED THAT THE DEFENDANT HAD USED THE VICTIM'S CAR FOLLOWING HER DEATH. INVESTIGATION DISCLOSED THAT FOLLOWING THE MURDER THE DEFENDANT BECAME FRIENDLY WITH SEVERAL FEMALES AND IDENTIFIED HIMSELF AS PAUL MORALES, SAID THAT HE WAS AN AFRICAN EXCHANGE STUDENT, WORKING PART-TIME AS A CAR SALESMAN. HE TOOK THE WOMEN TO THE APARTMENT HE SHARED WITH THE DECEASED AND TOLD THEM THAT HIS GIRLFRIEND HAD LEFT HIM VERY HURT AND MISTRUSTING OF WOMEN BECAUSE AFTER LIVING TOGETHER AND PROMISING TO MARRY HIM SHE SUDDENLY DECIDED TO LEAVE AND RETURN TO HER HUSBAND, AND HE ATTEMPTED TO BECOME

ROMANTICALLY INVOLVED WITH ONE OF THE WOMEN HE MET.

(HE DENIED THE CRIME DURING PRE-SENTENCE INVESTIGATION AND FOLLOWING COMMITMENT TO STATE PRISON, AND ALLEGED THAT HE WAS FOUND GUILTY "UNCONSTITUTIONALLY." HE DESCRIBED HIMSELF AS A "VICTIM OF CIRCUMSTANCES" AND ALLEGED THAT HE HAD RECEIVED A LETTER FROM THE DECEASED'S EX-BOYFRIEND, WHO WROTE THAT IF HE COULD NOT HAVE HER, NO ONE ELSE COULD.
(DEFENDANT LATER FILED SEVERAL SUITS NAMING AS DEFENDANTS THE LAPD AND OTHER PERSONS AND AGENCIES.)

PRESENT OFFENSE:

THE DEFENDANT WAS ARRESTED BY OFFICERS OF THE LOS ANGELES POLICE DEPARTMENT, ROBBERY/HOMICIDE DETECTIVES, ON AUGUST 22, 1980 AT 212 EAST REGENT STREET, INGLEWOOD, ON SUSPICION OF MURDER. HE WAS CHARGED WITH 187 PENAL CODE (MURDER WITH A PRIOR MURDER CONVICTION) PURSUANT TO 190.2(A)(2). ON APRIL 13, 1982, IN DEPARTMENT 120, DEFENDANT PLEADED GUILTY TO 187 PENAL CODE, SECOND DEGREE. FURTHER PROCEEDINGS WERE CONTINUED FOR PROBATION AND SENTENCE HEARING TO JUNE 18, 1982, TO WHICH DATE DEFENDANT WILL HAVE BEEN CUSTODY FOR APPROXIMATELY 700 DAYS.

SUMMARIZED FACTS AS BASED ON PRELIMINARY HEARING TESTIMONY, INFORMATION IN THE DISTRICT ATTORNEY'S FILE, AND ARREST REPORTS ARE AS FOLLOWS:

THE VICTIM IN THIS OFFENSE WAS LOIS WASHABAUGH, A 75-YEAR-OLD FEMALE. THE VICTIM WAS A WIDOW AND LIVED IN A MOBILE HOME IN SOQUEL, CALIFORNIA. SHE HAD BECOME INTERESTED IN PRISON REFORM AND STARTED VISITING PRISON INMATES INCLUDING THE DEFENDANT WHOM SHE SAW FREQUENTLY WHILE HE WAS INCARCERATED IN SOLEDAD. SHE WAS A CHRISTIAN SCIENTIST AND APPARENTLY ATTEMPTED TO CONVERT HIM TO HER RELIGION. IN ADDITION TO PRISON VISITS THEY CARRIED ON CORRESPONDENCE WITH THE DEFENDANT WRITING HER NUMEROUS LETTERS, BOTH IN 1979 AND IN 1980, IN WHICH HE ADDRESSED HER IN LOVING AND ENDEARING TERMS DETAILING HIS PLANS FOR THE FUTURE AND ULTIMATELY THEIR LIFE TOGETHER. IN HIS LETTERS HE GAVE HER INSTRUCTIONS AND ADVICE REGARDING HER PROPERTY, SPOKE EXTENSIVELY REGARDING HER MOBILE HOME, AND GLOWINGLY OF THEIR "LOVE-LIFE" TOGETHER. THE DEFENDANT WROTE TO HER OF THE MANY JOB OFFERS THAT HE HAD RECEIVED, HIS EDUCATIONAL PLANS FOR THE FUTURE, AND INSERTED CONSTANT REFERENCES OF CHRISTIANITY AND THEIR SUPPOSED MUTUAL LOVE OF CHRIST.

THE DEFENDANT TRANSFERRED TO LOS ANGELES AREA HALF-WAY HOUSE ON APRIL 14, 1980 AND IN ANTICIPATION OF HIS UPCOMING PAROLE THE DECEASED VISITED LOS ANGELES FOR ONE DAY ON APRIL 30, 1980 AND SECRETLY MARRIED HIM. ON JULY 4, 1980 SHE LEFT HER MOBILE HOME IN SOQUEL, CALIFORNIA AND TOLD FRIENDS THAT SHE WAS MOVING TO LOS ANGELES TO LIVE WITH HER HUSBAND. LATER THAT DAY SHE BOUGHT GAS IN LOS ANGELES AND WAS NEVER SEEN ALIVE AGAIN.

THE DECEASED'S SON, DWIGHT WASHABAUGH, A RESIDENT OF COLORADO, TESTIFIED THAT HE LAST SPOKE WITH HIS MOTHER BY PHONE ON JUNE 27, 1980 AT WHICH TIME SHE WAS IN HER HOME IN SOQUEL, CALIFORNIA. HE HAD NO FURTHER CONTACT WITH HER AFTER THAT DATE. HE TESTIFIED THAT A DIAMOND RING THAT WAS FOUND IN THE DEFENDANT'S POSSESSION FOLLOWING HIS ARREST BELONGED TO HIS MOTHER.

ON JULY 7, 1980 A HUMAN HAND WAS FOUND BY OFFICERS OF THE LOS ANGELES POLICE DEPARTMENT IN THE TRAFFIC LANE ON THE NORTHBOUND HOLLYWOOD FREEWAY AT VERMONT. A MISSING PERSONS REPORT HAD BEEN FILED ON THE DECEASED ON OR ABOUT THE END OF JULY OF 1980 AND AN INVESTIGATION AS TO HER DISAPPEARANCE WAS INITIATED BY DETECTIVES FROM LOS ANGELES POLICE

DEPARTMENT ROBBERY/HOMICIDE DIVISION AND THE SANTA CRUZ SHERIFF'S DEPARTMENT. ON AUGUST 7, 1980 INVESTIGATION DISCLOSED THROUGH FINGERPRINT IDENTIFICATION THAT THE HUMAN HAND THAT WAS FOUND ON THE FREEWAY WAS THAT OF MRS. WASHABAUGH. AFTER THE HAND WAS FOUND IT WAS LEARNED THAT DEFENDANT HAD OBTAINED POSSESSION OF THE DECEASED'S VEHICLE AND HAD USED HER CREDIT CARDS, FORGING HER NAME. THE DEFENDANT WAS SUBSEQUENTLY TAKEN INTO CUSTODY AT WELLS BAILBONDS OFFICE AT 212 EAST REGENT STREET WHERE HE LIVED. AT THE TIME OF THE ARREST THE DEFENDANT WAS IN POSSESSION OF THE DECEASED'S CAR, HER PURSE, CREDIT CARDS, AND HER DIAMOND RINGS. THE DECEASED'S BODY HAS NEVER BEEN FOUND.

DEFENDANT'S STATEMENT:

THE DEFENDANT DECLINED TO SUBMIT A WRITTEN STATEMENT AND REFUSED TO DISCUSS THE CASE. WHEN INTERVIEWED HE SAID THAT ALL THE INFORMATION REGARDING THIS CASE COULD BE OBTAINED FROM LAWRENCE WILSON, AN INMATE AT STATE PRISON, AND DEFENDANT SAID THAT HE PLEADED GUILTY BECAUSE OF HIS PRIOR CASE. HE HAS NO VISITORS AND NO CORRESPONDENCE, AND COMPLAINED THAT EVER LETTER HE SENT OUT OR RECEIVED HAD BEEN XEROXED. HE SAID THAT HE WAS ARRESTED BY THE SAME "TEAM" WHO ARRESTED HIM IN THE

PREVIOUS CASE AND HE HAS BEEN AT A "DISADVANTAGE." IN DISCUSSING THE VICTIM, HE SAID ONLY THAT HE MARRIED HER BECAUSE HER SON WANTED TO PUT HER INTO AN INSTITUTION AND HE NEVER LIVED WITH HER. WHEN RELEASED HE PLANS TO RETURN TO PUERTO RICO OR "NEXT TIME" HE WILL BE "BLOWN AWAY" (REFERRING TO POSSIBLE FURTHER ARRESTS).

DURING THE INTERVIEW THE DEFENDANT WAS ARTICULATE AND COMPOSED AND SELF-ASSURED. IN DISCUSSING HIS BACKGROUND HE SAID THAT HE HAD A VARIETY OF JOBS, WORKED AS A MANAGER OF CLOTHING STORE, SALESMAN, AND TRAVELLED "ALL OVER THE COUNTRY." PRIOR TO ARREST HE HAD BEEN TAKING COURSES AT CALIFORNIA STATE - LOS ANGELES AND HAD RECEIVED A GRANT OF $2,700.

INTERESTED PARTIES:

INVESTIGATING OFFICE STALLCUP, ROBBERY/HOMICIDE DETECTIVES, CONSIDERS THE DEFENDANT EXTREMELY VIOLENT, WHO KNOWS HOW TO MANIPULATE THE SYSTEM. WHILE IN PRISON THE DEFENDANT CONNED PRISON STAFF WHICH LED TO HIS PAROLE. INVESTIGATION DISCLOSED THAT PART OF THE DEFENDANT'S PRISON RECORD DISAPPEARED AND WHILE IN PRISON HE CORRESPONDED WITH WOMEN OTHER THAN THE VICTIM. INVESTIGATION LATER DISCLOSED THAT ONE OF THE WOMEN HE

CORRESPONDED WITH WAS ONE JENNIFER "SUGAR" BOVAIN, A RESIDENT OF SAN DIEGO AND WROTE TO HER REQUESTING THAT SHE FIND A PLACE FOR HIS MOBILE HOME WHICH HE WANTED TO MOVE FROM SALINAS TO ANY PLACE HE COULD FIND A SPACE IN SOUTHERN CALIFORNIA. IN A LETTER WRITTEN TO HER IN MARCH OF 1980 HE CLAIMED THAT A COUPLE HAD BEEN LIVING IN HIS TWO-BEDROOM MOBILE HOME FOR SOME TIME AND HE ALSO INDICATED THAT HE HAD BEEN ACCEPTED AT CALIFORNIA STATE - LOS ANGELES IN THEIR MASTERS PROGRAM. IN THOSE LETTERS TO THIS WOMAN WHICH ALSO INCLUDED REFERENCES TO THE BIBLE, HE CLAIMED THAT ONE OF HIS GRANDPARENTS WAS STILL LIVING IN SOUTH AFRICA.

INVESTIGATING OFFICER DOUBTS THAT THE DEFENDANT COMES FROM PUERTO RICO AND STATES THAT IT HAS BEEN IMPOSSIBLE TO LEARN HIS TRUE IDENTITY. HE FEELS THAT THE DEFENDANT SHOULD NEVER BE RELEASED FROM STATE PRISON AND WILL MAKE HIS FEELINGS KNOWN IF AND WHEN THE DEFENDANT EVER COMES UP FOR PAROLE CONSIDERATION. aS HE DID IN THE PAST, THE DEFENDANT HAS FILED SEVERAL SUITS IN RELATION TO THE PRESENT OFFENSE, INCLUDING SUITS AGAINST LOS ANGELES POLICE DEPARTMENT AND THE CORONER WHO DISCARDED THE VICTIM'S HAND AFTER IT WAS INTRODUCED INTO EVIDENCE.

ACCORDING TO DETECTIVE ENYEART, INGLEWOOD POLICE DEPARTMENT, THE DEFENDANT THOUGH NOT CHARGED IS CONSIDERED A SUSPECT IN THE MURDER OF GEORGE BIEBER, WHOSE BODY WAS FOUND AT HIS BUSINESS ADDRESS WHICH WAS ALSO HIS HOME RESIDENCE ON JULY 17, 1980. THE LOCATION WAS NEXT TO WHERE THE DEFENDANT WORKED AND LIVED AT WELLS BAILBONDS AT 212 EAST REGENT STREET. THE DECEASED HAD BEEN A PRINTER AND FREQUENTLY WORKED LATE AT NIGHT LEAVING HIS DOOR OPEN. HE HAD SUSTAINED MASSIVE TRAUMATIC INJURIES TO THE LEFT SIDE OF HEAD WITH EXTENSIVE LOSS OF BLOOD. IT WAS REVEALED THAT HE HAD SUSTAINED FOUR SEPARATE AND DISTINCT TRAUMATIC INJURIES WHICH DESTROYED CONSIDERABLE BONE STRUCTURE IN THE UPPER JAW AND TEMPLE AREA. IT WAS DETERMINED THAT THE VICTIM HAD BEEN BEATEN NUMEROUS TIMES IN THE FACIAL AREA AND SKULL AND JAW WITH A HAMMER. AT THE TIME THE BODY WAS FOUND HIS WALLET, WHICH CONTAINED UNKNOWN ITEMS, IN A DESK DRAWER WAS OPEN. IT WAS REPORTED THAT THE VICTIM USUALLY KEPT PETTY CASH IN THE DRAWER WHICH WAS ALSO MISSING. IT WAS ALSO LEARNED FROM OWNERS OF A LUGGAGE SHOP AT 220 EAST REGENT STREET, WHO WERE FEARFUL OF RELEASING THEIR NAMES, THAT ON JULY 16, 1980 THE DEFENDANT HAD COME INTO THEIR SHOP AND INQUIRED AS TO WHAT TYPE OF BUSINESS THEY RAN IN THE REAR PORTION OF THEIR SHOP. THE

DEFENDANT TOLD THEM THAT HE LIVED IN THE REAR OF THE BAIL AGENCY AND OFTEN HEARD A TOILET DURING THE NIGHT. THE OWNER TOLD THE DEFENDANT THAT THE TOILET PROBABLY WAS THAT OF MR. BIEBER WHO LIVED IN THE BACK OF THE PRINT SHOP AND WOULD OFTEN WORK LATE INTO THE NIGHT. ACCORDING TO OFFICER ENYEART THE DEFENDANT ALSO ASKED THESE WITNESSES IF THEY HAD A HAMMER. HE DESCRIBES THIS MURDER SAME TYPE AS "OVER KILL" SIMILAR TO THE MODUS OPERANDI IN THE DEFENDANT'S MURDER OF HIS GIRLFRIEND IN 1970.

FOLLOWING IS SUMMARY FROM THE DEPARTMENT OF CORRECTIONS CASE HISTORY. FOLLOWING HIS COMMITMENT TO PRISON THE DEFENDANT CONTINUED TO DENY GUILT AND INITIALLY HE SAID THAT HE WAS NOT INTERESTED IN PAROLE. HE COMPLAINED THAT HIS PUBLIC DEFENDER DID A POOR JOB IN PREPARING THE CASE AND SAID THAT ON NUMEROUS OCCASIONS HE TRIED TO DISMISS HIM, BUT WAS UNSUCCESSFUL. HE ALSO APPEALED TO THE GOVERNOR TO TRADE HIMSELF FOR A PRISONER OF WAR IN VIETNAM ON A LIFE TO LIFE BASIS WHICH WAS REFUSED. HE GAVE A HAZY ACCOUNT OF HIS BACKGROUND AND PAST HISTORY. WHILE IN PRISON HE HAD NUMEROUS PSYCHIATRIC EVALUATIONS AND AT NO TIME WAS THERE ANY INDICATION OF PSYCHIATRIC ILLNESS. HE IMPRESSED PRISON PERSONNEL WITH HIS DESIRE TO IMPROVE HIMSELF AND FURTHER HIS

EDUCATION. HE WAS DESCRIBED AS COOPERATIVE, VERBAL, AND GOAL-ORIENTED. (THE DEFENDANT ALSO MADE A FAVORABLE IMPRESSION ON THE DUTY PROBATION OFFICER WHO PREPARED THE PRE-SENTENCE REPORT IN THE DEFENDANT'S PREVIOUS CONVICTION. DURING THE PRE-SENTENCE INVESTIGATION HE CLAIMED THAT HE CAME HOME EARLY FROM WORK ONE DAY AND SAW THE DECEASED WITH A MAN WHO HAD SUITCASE AND HE FOLLOWED THEM TO THE LOCATION WHERE HER BODY WAS LATER FOUND, THEN LEFT, AND RETURNED TO LOOK FOR HER AND DISCOVERED HER BODY AFTER HE FOLLOWED A TRAIL OF BLOOD. HE ALLEGES THAT HE STARTED DRINKING, TOOK ONE OF THE DECEASED'S RINGS, PAWNED IT TO BUY MORE WHISKEY, AND HAD BEEN THREATENED BY MAIL BY THE DECEASED'S EX-BOYFRIEND AND WAS TOO SCARED TO GO TO THE POLICE. HE ALSO CLAIMED THAT THE GUN FOUND BELONGED TO HER.)

EVALUATION:

DESCRIBE THE DEFENDANT AS AN ENIGNA WOULD BE AN UNDERSTATEMENT. HOWEVER, TO REGARD HIM AS ANYTHING LESS THAN A DELIBERATE, CALCULATING, COLD-BLOOD MURDERER WOULD BE UNTENABLE. ALTHOUGH IT IS UNLIKELY THAT VERIFIABLE INFORMATION REGARDING THE DEFENDANT'S BACKGROUND WILL EVER BE REVEALED, THERE CAN BE NO UNCERTAINTY REGARDING THE CRUELTY HE EXHIBITED IN BOTH

OF THE MURDERS OF WHICH HE HAS BEEN CONVICTED BOTH OF WHICH HE DENIES GUILT.

INVESTIGATION DISCLOSES THAT THE DEFENDANT PRESUMABLY HAS AN ABUNDANCE OF "CHARM" WHICH HE USES TO EXPLOIT, MANIPULATE OTHER INCLUDING THE VICTIM IN THIS OFFENSE, A 75-YEAR-OLD WOMAN WHO FOOLISHLY AND UNFORTUNATELY BECAME MESMERIZED BY THE SPELL HE WEAVED. FACTS REVEALED IN THIS OFFENSE CLEARLY DENOTE THAT THE DEFENDANT'S MOTIVE WAS GREED AND THE DESIRE TO ACQUIRE THE VICTIM'S PROPERTY.

IT IS SIGNIFICANT THAT WHILE HE WAS STILL IN PRISON AND HAD ALREADY "WON" OVER THE VICTIM IN HIS SUPPOSED ROMANTIC PLANS FOR THE FUTURE HE WAS ALSO SIMILARLY ENGAGED IN THE SAME TYPE OF OPERATION WITH A YOUNG WOMAN IN WHICH HE MENTIONED HIS OWN PROPERTY WHICH IN FACT BELONGED TO THE DECEASED. IT MUST THEREFORE BE ASSUMED THAT THE PLANS FOR MURDER HAD BEEN DECIDED UPON LONG BEFORE HIS PAROLE.

IF THE FACTS IN THIS MURDER WERE NOT SO TRAGIC, THE DEFENDANT'S PLAN TO "PROMOTE" HIMSELF WITH HIS GLOSSARY OF HIS EDUCATION AND EMPLOYMENT WOULD BE LAUGHABLE. EVERYTHING THE DEFENDANT HAS DONE HAS BEEN ACCOMPLISHED WITH A DELIBERATE PURPOSE IN MIND, ALL TO ENHANCE HIMSELF.

THE DANGER THE DEFENDANT PRESENTS CANNOT BE OVEREMPHASIZED AND IN THE BEST INTERESTS OF SOCIETY, IT IS HOPED THAT HE WILL REMAIN IN PRISON FOR THE REST OF HIS LIFE. IF AND WHEN PAROLE IS EVER CONSIDERED IT IS HOPED THAT THOSE PERSONS RESPONSIBLE FOR MAKING THIS DECISION WILL REMAIN COGNIZANT OF THE DEFENDANT'S PROVEN VIOLENCE AND RESIST WHATEVER MANIPULATIVE TECHNIQUES HE MAY DEVISE IN THE FUTURE.

SENTENCING CONSIDERATIONS:

CIRCUMSTANCES IN AGGRAVATION:

1. THIS CRIME INVOLVED GREAT VIOLENCE, RESULTING IN THE DEATH OF A HUMAN BEING, DISCLOSING A HIGH DEGREE OF CRUELTY, VICIOUSNESS, AND CALLOUSNESS.

2. THE VICTIM WAS PARTICULAR VULNERABLE IN VIEW OF HER AGE.

3. THE PLANNING WITH WHICH THIS CRIME WAS CARRIED OUT INDICATES PREMEDITATION.

4. THE DEFENDANT HAS ENGAGED IN A PATTERN OF VIOLENT CONDUCT WHICH INDICATES A SERIOUS DANGER TO SOCIETY.

5. DEFENDANT HAS SERVED A PRIOR PRISON TERM.

6. DEFENDANT WAS ON PAROLE WHEN HE COMMITTED THIS CRIME.

CIRCUMSTANCES IN MITIGATION:

NONE.

RECOMMENDATION:

IT IS RECOMMENDED THAT PROBATION BE DENIED AND DEFENDANT SENTENCED TO STATE PRISON.

RESPECTFULLY SUBMITTED,

KENNETH E. KIRKPATRICK
PROBATION OFFICER

BY /s/ Doris Feldman
DORIS FELDMAN, DEPUTY
CENTRAL ADULT INVESTIGATIONS
974-9373

READ AND APPROVED:

/s/ Kenneth Hill
KENNETH HILL, SDPO

(SUBMITTED: 6-14-82)
(RECEIVED: 6-14-82)
(TYPED: 6-16-82)
DF:PH (7)

I HAVE READ AND CONSIDERED THE FOREGOING REPORT OF THE PROBATION OFFICER

_____

JUDGE OF THE SUPERIOR COURT

IF PROBATION IS GRANTED, IT IS RECOMMENDED THAT THE COURT DETERMINE DEFENDANT'S ABILITY TO PAY COST OF PROBATION SERVICES PURSUANT TO SECTION 1203.1B PENAL CODE.

SUPPLEMENTAL APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RAMON MORALES, Petitioner, v. DIRECTOR OF CORRECTIONS AND ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents.	No. CV 91-699-HLH(T) REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Harry L. Hupp, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order No. 194 of the United States District Court for the Central District of California.

Petitioner is in state custody at Soledad, California. He filed a petition for writ of habeas corpus of December 2, 1991. Petitioner alleges numerous grounds for relief. For the reasons discussed below, he is entitled to partial relief.

FACTS

Petitioner was convicted in 1971 of the first degree murder of his girlfriend. Upon his release from prison in May 1980, he married Lois Washabaugh. She disappeared between July 4 and July 7, 1980. Several weeks later, her left hand was found on the Hollywood Freeway in Los Angeles; her body was never recovered.

In April 1982, petitioner pleaded nolo contendere to the second degree murder of Mrs. Washabaugh. He was sentenced to a term of fifteen years to life.

Petitioner's minimum parole eligibility date for the current conviction was August 2, 1990. On July 25, 1989, the Board of Prison Terms (the "Board") conducted an initial parole reconsideration hearing. The Board found petitioner unsuitable for parole for the following reasons:

> The offense was carried out in an especially heinous, atrocious and cruel manner which exhibits a callous disregard for the life or suffering of another. The victim was mutilated during or after the offense.... The prisoner has a record of violence and assaultive behavior and an escalating pattern of criminal conduct and violence. [He] has an unstable social history and prior criminality which includes being found guilty of first degree murder, later being granted parole and then committing a second

> murder. Both being female victims intimately associated with the prisoner. (Return 74-75)[1]

The Board quoted from a psychiatric report indicating a need for further observation and treatment. (Return 77). The Board concluded that "[u]ntil progress is made, [the prisoner] continues to be unpredictable and a threat to others." (Return 76).

The Board concluded that petitioner's next hearing would be held three years later, in July 1992.

DISCUSSIONS

A. EX POST FACTO APPLICATION OF PAROLE SUITABILITY STATUTE.

When petitioner pleaded nolo contendere to the second degree murder of Mrs. Washabaugh in 1980, California Penal Code § 3041.5(b)(2) required annual parole suitability hearings for prisoners who had not yet received parole release dates. In 1981, an amendment to section 3041.5 authorized the Board to schedule subsequent hearings up to three years apart in the case of a prisoner convicted of more than one offense involving the taking of a life. The Board has applied this three-year provision to petitioner. He contends this was an

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1. The Board's findings following the suitability hearing are submitted as exhibit 4 to the Return.

ex post facto application of law. (Petition 6; Memo 5, 8-9)[2/]

A penal law is ex post facto if 1) it is retrospective, applying to events that occurred before its enactment, and 2) it disadvantages the offender affected buy it. Weaver v. Graham, 450 U.S. 24, 29 (1981); Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990); Watson v. Estelle, 886 F.2d 1093, 1094 (9th Cir. 1989).

Respondent concedes the 1981 amendment to section 3041.5 was applied retrospectively to petitioner. (Return 22). The amendment is retrospective because it establishes a different timetable for parole eligibility hearings for defendants lie petitioner, who committed their crimes before its amendment. Watson, 886 F.2d at 1095; see also Weaver, 450 U.S. at 31.

A retrospective statute disadvantages the offender affected by it if it makes the punishment for a crime more burdensome after its commission. Collins, 110 S. Ct. at 2719 (citing Beazell v. Ohio, 269 U.S. 167, 169-70 (1925)). Therefore, the issue is whether the 1981 amendment to section 3041.5 makes the punishment for petitioner's crime more burdensome.

The Supreme Court stated in dicta that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present [a] serious question under the ex post facto clause...." Warden v. Marrero, 417 U.S. 653 663 (1974).

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2. "Memo" refers to Petitioner's Memorandum of Points and Authorities in Support of Petition for Habeas Corpus, filed with the Petition.

Because parole eligibility is a part of the sentence imposed for a crime, many courts hold that ex post facto principles apply to retrospective statutes that affect parole eligibility. See Atkins v. Snow, 922 F.2d 1558, 1563, 1565 (11th Cir.), cert. denied, 111 S. Ct. 2915 (1991); Fender v. Thompson, 883 F.2d 303, 306 (4th Cir. 1989); Rodriguez v. United States Parole Comm'n, 594 F.2d 170, 176 (7th Cir. 1979); Tiller v. Klincar, 138 Ill.2d 1, 561 N.E.2d 576, 580 (Ill. 1990), cert. denied, 111 S. Ct. 688 (1991); Gluckstern v. Sutton, 319 Md. 634, 574 A.2d 898, 914-15, cert. denied, 111 S. Ct. 369 (1990); see also Weaver, 450 U.S. at 35-36 (applying ex post facto principles to sentence credits).

Recently the Eleventh Circuit and the Illinois Supreme Court considered the ex post facto effect of replacing an annual parole suitability hearing with a longer review period. Akins, 922 F.2d 1558; Tiller, 561 N.E.2d 576. In Akins, the statute was revised to require parole hearings once every eight years; in Tiller, the period was extended to once every three years. Akins, 922 F.2d at 1560; Tiller, 561 N.E.2d at 577-78. Both courts held that extending the time an inmate must spend in prison before he or she is reconsidered for parole substantially disadvantages the prisoner, and violates the ex post facto clause. Akins, 922 F.2d at 1564-65; Tiller, 561 N.E.2d at 580. The ex post facto effect of the Illinois statute was not ameliorated by requiring the parole board to find that parole was not likely to be granted during the interim three years. Tiller, 561 N.E.2d at 579-80.

Under Akins and Tiller, the application of the 1981 amendment to section 3041.5 to defer petitioner's next parole suitability hearing for three years is a violation of the ex post facto clause. The violation is not alleviated by the Board's

finding that petitioner was unlikely to be granted parole within the three-year interim period.

Respondent cites the Ninth Circuit's opinion in Watson, 886 F.2d 1093, as controlling this case because it involved the ex post facto effect of the 1981 amendment to California Penal Code § 3041.5. However, Watson committed his offenses in 1969, when there was no statutory guarantee on the frequency of parole suitability hearings. Id. at 1094. Because the key ex post facto inquiry is the actual state of the law at the time of the offense, Watson is inapplicable. See id. at 1096.

Respondent also argues the 1981 amendment to section 3041.5 is not ex post facto because it is merely a procedural change, citing In re Jackson, 39 Cal. 3d 464, 703 P.2d 100, 216 Cal. Rptr. 760 (9185), and Morris v. Castro, 166 Cal.App.3d 33, 212 Cal. Rptr. 299 (9185). These cases are not dispositive, however, because whether a state criminal statute violates the ex post facto clause is a federal question. See Weaver, 450 U.S. at 33; Watson, 886 F.2d at 1095.

Looking to federal law, the concurring opinion in Watson applied the procedural change analysis referred to by respondent, and found no ex post facto violation. Watson, 886 F.2d at 1100 (Marquez, J., concurring). Nonetheless, this analysis is weakened by current law. The Supreme Court has severely criticized the "procedural change" analysis, stating that the ex post facto clause may be violated by laws, "whatever their form," that increase punishment. Collins, 110 S. Ct. at 2721; see also Miller v. Florida, 482 U.S. 423, 433 (1987); Weaver, 450 U.S. at 29 N.12; Akins, 922 F.2d at 1564-65.

The 1981 amendment to section 3041.5, authorizing the Board to defer parole suitability hearings for three years, applies retrospectively and makes petitioner's punishment more burdensome. It is an ex post facto law prohibited by the Constitution. The proper relief for this ex post facto violation is to remand the case to permit the state court to apply the law in place when petitioner's crime occurred. Weaver, 450 U.S. at 36 n.22.

As discussed below, the remainder of petitioner's claims do not merit relief.

B. VOLUNTARINESS OF THE PLEA.

Petitioner next contends his nolo contendere plea was involuntary because the trial court failed to advise him that his prior murder conviction would affect his parole eligibility. (Petition 7). He also claims the prosecutor misrepresented the sentence by stating he would be paroled after serving ten years in prison (Memo 5), and he asserts he would not have pleaded nolo contendere if he had known that after serving ten years his parole might be denied based on his prior conviction. (Petition 7; Memo 5).

A plea of nolo contendere has the same legal effect as a guilty plea. Cal. Penal Code § 1016; see Hudson v. United States, 272 U.S. 451 455 (1926) Due process requires a guilty plea to be knowing and voluntary, entered with a sufficient awareness of the relevant circumstances and likely consequences of the plea. Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969) Whether a defendant subjectively understood the consequences

of his or her plea is a factual issue subject to a presumption of correctness when determined by a state court. Iaea v. Sunn, 800 F.2d 861, 866, 868 n.7 (9th Cir. 1986); United States v. Signori, 844 F.2d 635, 638 (9th Cir. 1988).

In this case, the state court expressly found petitioner understood the nature and consequences of his plea. (Return 199).[3/] Furthermore, the record of the plea proceeding reveals petitioner received the benefit of an informed plea bargain.

The prosecutor did not promise petitioner he would be paroled after ten years. Rather, he stated that if petitioner received the maximum post-conviction credit, his minimum sentence could be as little as ten years. (Return, Exh. 8, p. 109). But, the prosecutor further cautioned that petitioner might serve the maximum life term. (Return, Exh. 8, p. 109).

Petitioner was accurately informed about the length of his Sentence and the possibility of parole. The court's failure to explain the effect his prior conviction would have on his parole eligibility was not a violation of petitioner's federal constitutional rights. See Hill v. Lockhart, 474 U.S. 52, 56 (1985); Murphy v. McCormick, 724 F.Supp. 774, 778 (D. Mont. 1989); see also Doganiere v. United States, 914 F.2d 165, 167 (9th Cir. 1990), cert. denied, 111 S. Ct. 1398 (1991) (holding that a federal judge is not required to inform a defendant about parole eligibility before accepting a plea).

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3. The Reporter's Transcript of the plea proceeding is submitted as exhibit 8 to the Return.

C. TRIAL COURT ERRORS.

Petitioner alleges the trial judge violated his due process rights by committing certain errors. Generally, federal habeas relief is not available for an error by a state judge in the application of state law. Pulley v. Harris, 465 u.s. 37, 41 (1984); Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). However, the error may be actionable if it rendered the proceedings so fundamentally unfair it violated federal due process. See Pulley, 465 U.S. at 41; Jammal, 926 F.2d at 919.

Petitioner first alleges the judge erred by failing to strike the special circumstance allegation concerning petitioner's prior conviction. (Petition 6, 7; Memo 10, 12). He believes this error permitted the Board to use the prior conviction to reach its decision to deny parole.

The transcripts of the plea and sentencing proceedings do not include a specific dismissal of the special circumstance charge. However, this failure does not amount to a violation of due process. Petitioner did not enter a plea to that charge, nor was sentence imposed on it. The Judgment states there was no finding on the special circumstance allegation. (Return 30). The Board's reliance on the prior conviction to deny petitioner's parole was appropriate under the regulations and was unrelated to the trial judge's actions. See Guzman v. Morris, 644 F.2d 1295, 1298 (9th Cir. 1981).

Petitioner next argues the judge failed to establish the factual basis for the plea or the reasons for the recommended plea agreement, as required by California Penal Code §§ 1192.5

and 1192.6. (Memo 5, 9). These alleged errors do not merit relief. Although it is good practice to establish the factual predicate for a plea on the record, it is not mandated by the Constitution. See United States v. Newman, 912 F.2d 1119, 1123 (9th Cir. 1990). Petitioner does not have standing to challenge the alleged error under section 1192.6. See People v. Gonzales, 188 Cal.App.3d 586, 590, 233 Cal.Rptr. 204 (1986).

Petitioner also contends that because the court stated he was sentenced "to state prison for 15 --," rather than "15 years to life," his indeterminate life sentence is invalid. (Memo 6, 9; Return 133). Petitioner's due process rights were not violated by the omission. As discussed above, petitioner understood he would receive a sentence of fifteen years to life. (Return 109). Further, this is the required sentence after a second degree murder conviction. Cal. Penal Code § 190.

These alleged errors by the trial judge do not constitute grounds for federal habeas relief. They did not render the plea proceedings or the conviction fundamentally unfair.

D. MINIMUM PAROLE ELIGIBILITY DATE.

Petitioner contends his due process rights were violated because the Board erroneously applied California's indeterminate sentencing law to him. He claims he received a determinate sentence, rather than an indeterminate life term. Under his determinate sentence, he is entitled to earn good-time credits, warranting his release on parole after service two-thirds of his minimum sentence of fifteen years. (Petition 7; Memo 6, 14-16; Traverse 11-13).

This claim involves the application of California sentencing and parole law. As discussed above, federal habeas relief is not available for an alleged violation of state law. Pulley, 465 U.S. at 41; Hernandez, 930 F.2d at 719; Jamal, 926 F.2d at 919. To the extent petitioner claims the state laws were arbitrarily interpreted and applied in violation of due process, they will be briefly examined.

To achieve uniformity in sentencing, California adopted a determinate sentencing scheme in 1977. Cal. Penal Code § 1170(a)(1); Guzman, 644 F.2d at 1296, but pursuant to a 1978 voter initiative, the penalty for a second degree murder was changed from a determinate sentence of five, six or seven years, to a mandatory indeterminate sentence of fifteen years to life. Cal. Penal Code § 190; see In re Dayan, 231 Cal.App.3d 184, 187, 282 Cal.Rptr. 269 (1991).

The sentencing court is not authorized to set the term or duration of the period of imprisonment for this crime. Cal. Penal Code § 1168(b); Dayan, 231 Cal.App.3d at 187. Instead, the Board has the authority to grant parole to defendants receiving indeterminate sentences. Cal. Penal Code §§ 3040, 3041.

Petitioner is correct that the California Department of Corrections may reduce his minimum term of fifteen years by one-third for good behavior. Cal. Penal Code §§ 190, 2931; see Brodheim v. Rowland, No. C 90-2892-TEH, 92 Daily Journal D.A.R. 2901, 2901 (N.D. Cal. Nov. 6, 1991); Dayan, 231 Cal.App.3d at 188, 189. This good-time credit is applied

to calculate petitioner's minimum parole eligibility date. Cal. Code Regs. tit. 15, § 2400; Dayan, 231 Cal.App.3d at 18.

But eligibility for parole does not equate to mandatory release on the minimum eligibility date. A parole release date will not be set until the Board determines petitioner is suitable for parole. Cal. Code Regs. tit. 15, §§ 2280-81, 2401-02; In re Stanworth, 33 Cal.3d 176, 183, 654 P.2d 1311, 187 Cal.Rptr. 783 (1982). Once he is found suitable, the Board will determine the amount of credit to be applied to his actual sentence pursuant to its regulations. See Cal. Code Regs. tit. 15, §§ 2290, 2400, 2410; Stanworth, 33 Cal.3d at 185-86; Dayan, 231 Cal.App.3d at 189.

California law has not been arbitrarily applied. Because petitioner received an indeterminate life sentence, the Board must find him suitable for parole before a parole release date will be assigned.

E. PAROLE SUITABILITY DETERMINATION.

Next, petitioner contends the Board violated his due process rights by basing its denial of parole on false and improper evidence. He asserts the following factors were wrongfully considered: his prior conviction for first degree murder; false testimony provided by the prison psychiatrist; false information presented in petitioner's probation report; assumed facts about the nature of the crime; and fabricated testimony from a prison informant. (Petition 6; Memo 4, 5-6, 7, 10-13, 17-22).

A federal court's review of a parole board's suitability decision is very limited. Pedro v. Oregon Parole Bd., 825 F.2d

1396, 1399 (9th Cir. 1987), cert. denied, 484 U.S. 1017 (1988). Assuming the California parole statute creates a protected liberty interest in early release, the requirements of due process are satisfied if some evidence supports the Board's decision to deny parole. Jancsek v. Oregon Bd. of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987); see also Superintendent v. Hill, 472 U.S. 445, 455 (1985); Pedro, 825 F.2d at 1399; In re Powell, 45 Cal.3d 894, 904, 755 P.2d 881, 248 Cal.Rptr. 431 (1988). In addition, the evidence must have some indicia of reliability. Jancsek, 833 F.2d at 1390; Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987).

Due process was satisfied in petitioner's case because there was considerable evidence supporting the Board's decision. The Board considered the manner of petitioner's offense, his previous record of violence, his unstable social history, and his psychological status. All of these factors are persuasive and proper considerations. See Cal. Code Regs. tit. 15, §§ 2281, 2402. In particular, the Board properly considered petitioner's prior conviction in reaching its decision. See Guzman, 644 F.2d at 1298.

There is no reason to believe the facts and reports relied upon by the Board lacked sufficient indicia of reliability. See Jancsek, 833 F.2d at 1390; Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987).

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There is no reason to believe the facts and reports relied upon by the Board lacked sufficient indicia of reliability. See Jancsek, 833 F.2d at 1390; see also Montgomery v. U.S. Parole Comm'n, 838 F.2d 299, 301 (8th Cir. 1988) (per curiam) (holding that a federal court will not reassess the credibility of the information used by the federal Parole Commission).

It is not necessary to examine the prison informant's testimony because there is no mention of it in either the response of the probation officer or the Board's report.

F. EX POST FACTO APPLICATION OF PAROLE ELIGIBILITY MATRIX.

Next, petitioner contends the Board's use of a matrix of base terms to determine his eligibility for parole was an ex post facto application of law. (Memo 5). This claim lacks merit because the Board did not utilize a matrix in its decision. A matrix is used to establish a base term for a prisoner who is found suitable for parole. Cal. Code Regs. tit. 15, §§ 2282, 2403. A matrix was not applied in petitioner's case because he has not yet been found suitable for parole.

G. PSYCHIATRIC TREATMENT.

Petitioner asserts his Eighth Amendment rights were violated by the Board's recommendation that he participate in

psychiatric treatment before his next parole suitability hearing. He believes the treatment will be used by the Board as another basis for denying his parole. (Memo 7a; Traverse 16; Return 78).

The Court ordered additional briefing on the issue.

As argued by respondent, the Board properly concluded that petitioner could benefit from participation in an alcohol abuse program. See Superintendent v. Hill, 472 U.S. 445, 447, 105 S.Ct. 2768, 274, 86 L.Ed.2d 356 (1985).

Thus, there is no merit to petitioner's allegation that such treatment will be used as a basis for denying parole.

CONCLUSION

The Magistrate Judge recommends the District Judge issue an order:

1) granting the petition in part, and remanding the case to permit the state court to reschedule petitioner's subsequent parole suitability hearing dates pursuant to the version of California Penal Code § 3041.5 in effect when petitioner's crime occurred; and

2) denying the petition and dismissing this action with prejudice as to all other claims.

DATED: May 18, 1992

VENETTA S. TASSOPULOS
United States Magistrate Judge

SUPPLEMENTAL APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RAMON MORALES, Petitioner, v. DIRECTOR OF CORRECTIONS AND ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents.	No. CV 91-699-HLH(T) ORDER ADOPTING IN PART AND REJECTING IN PART THE RECOMMENDATION OF MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court has reviewed the petition, all of the records and files herein, the Report and Recommendation of Magistrate Judge, and the objections to the Magistrate Judge's Report and Recommendation filed herein. After making a de novo determination, the Court adopts the findings and conclusions of Magistrate Judge except for the portion pertaining to the application of the Ex Post Facto Clause.

Petitioner was convicted of first degree murder in 1970. He was sentenced to life imprisonment and paroled in 1980. In

July 1982, petitioner pled nolo contendere to a second degree murder charge. Prior to 1981, California Penal Code § 3041.5(b)(2) required annual suitability hearings for prisoners who had not yet received parole release dates. In 1981, after the second murder had already been committed, § 3041.5(b)(2) was amended to permit the Parole Board to schedule subsequent parole hearings up to three years apart in cases where (1) the prisoner had been convicted of more than one murder and (2) the Board found that it was not reasonable to expect that the prisoner would be found suitable for parole in the interim. The Parole Board applied this three year provision to petitioner. Petitioner asserts that the application of amended § 3041.5(b)(2) was a violation of the Ex Post Facto Clause.

In her excellent Report and Recommendation, the Magistrate Judge recommended that the Court find that the Ex Post Facto Clause was violated by the application of § 3041.5(b)(2) to a prisoner, such as Petitioner Morales, where the second murder was committed before the date of the amendment. The Court disagrees. An amendment to a law that is procedural does not violate the Ex Post Facto Clause even if it disadvantages the accused. Collins v. Youngblood, 497 U.S. - , 110 S.Ct. -, 111 L.Ed.2d 30, 36 (190). In Collins, the United States Supreme Court applied the procedural change exception to a sentence reformation statute. In the Collins case, the defendant was convicted of aggravated sexual abuse and sentenced by a jury to life imprisonment and a $10,000 fine, but the fine was later deemed improper. At the time the crime was committed, such a jury error constituted grounds for a new trial. By the time of sentencing, however, the law had been changed to allow reformation of a jury verdict. The

defendant claimed that he was entitled to a new trial and that application of the amended law to him would violate the Ex Post Facto Clause. The Court held that reformation of a verdict was merely a procedural change and thus not a violation of the Ex Post Facto Clause.

The Court defined a procedural change as a change "in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." Id. at 40. While the Court acknowledged the Ex Post Facto Clause is violated by any laws "'whatever their form', which make innocent acts criminal, alter the nature of the offense, or increase the punishment,' it criticized causes that sought to enlarge the Clause by extending it, without explanation, to "substantial protections with which the existing law surrounds the person accused of crime" or to laws that infringe upon "substantial personal rights." Id. at 40-41, 44. In doing so, the Court clarified that procedural changes remained outside the prohibitions of the Ex Post Facto Clause.

Recognizing this procedural change exception, the California courts have held that the amendment of Penal Code § 3041.5 is merely a procedural change and thus not a violation of the Ex Post Facto Clause. Morris v. Castro, 166 Cal.App-.3d 33, 212 Cal.Rptr. 299 (1985); In re Jackson, 39 Cal.3d 464, 216 Cal.Rptr. 760 (1985). As the Magistrate Judge notes, the court is not bound by these cases since this is a federal issue,[1] their reasoning is persuasive. For instance, in Morris,

1. See Weaver v. Graham, 450 U.S. 24, 33, 101 S.Ct. 960, 67 L.Ed.2d 17, 25 (1981); Watson v. Estelle, 886 F.2d 1093, 1095 (9th Cir. 1989).

suitability hearing for two or three years was "no arbitrary decision" as it was made only after a full hearing and review of the inmate's criminal history, commitment offense, attitude toward his crime, behavior in prison, psychological and rehabilitation problems, age, parole plans and marketable skills. Morris, 166 Cal.App.3d at 38. Thus, the court concluded that "changes permitted by the amended statute are proper administrative and procedural methods for dealing with respondent life prisoners, who . . . committed multiple murder, and all of whom has demonstrated that they are unsuitable candidates for parole." Id. in Jackson, the California Supreme Court also found that the amendment to Penal Code § 3041.5 was a procedural change because it does not alter the criteria by which parole suitability is determined, nor does it deprive the inmate of the right to a parole suitability hearing. Jackson, 39 Cal.3d at 473-474.

The Magistrate Judge in her Recommendations relied on Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991), the most analogous federal case.

The court believes that Akins is distinguishable. In Akins, the Eleventh Circuit held that the Ex Post Facto Clause was violated by an amendment to a criminal statute that allowed parole hearings every eight years, instead of annually, for prisoners convicted of multiple murders. The period of review involved in Akins is a substantially greater extension of time (eight years) than that in Penal Code § 3041.5 (three years). This disparity is significant, for it is more difficult to predict a prisoner's parole eligibility for eight year periods than for three year periods. More important, Penal Code § 3041.5 has procedural safeguards to ensure that the prisoner receives a

fair eligibility assessment. If the Board plans to postpone annual review, in addition to evaluating the prisoner on the normal suitability criteria, it must also attach a "statement of reasons." Jackson, 39 Cal.3d at 477. Thus, it is unlikely that California's new procedure will impair any prisoner's substantial rights. In Akins, on the other hand, there is no analysis of whether the parole suitability criteria changed with the extension of the parole review hearing.

The Court finds, therefore, that the amendment of Penal Code § 3014.5(b)(2) was a procedural change that does not impair the petitioner's substantive rights nor violate the Ex Post Facto Clause. Accordingly, the Petition for Writ of Habeas Corpus is hereby dismissed. Judgment to enter dismissing the petition.

IT IS SO ORDERED.

DATED: August 20, 1992.

HARRY L. HUPP
United States District Judge

SUPPLEMENTAL APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE RAMON MORALES, Petitioner, v. DIRECTOR OF CORRECTIONS AND ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents.	No. CV 91-699-HLH(T) JUDGMENT DISMISSING HABEAS CORPUS ACTION

Pursuant to Order adopting in part and rejecting in part the recommendation of Magistrate Judge, the subject habeas corpus petition is hereby dismissed in its entirety.

IT IS SO ORDERED.

DATED: August 20, 1992.

HARRY L. HUPP
United States District Judge